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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

VIVIANA MCCALDEN, as Administrator of the Estate of David McCalden,
Petitioner,
vs.
SIMON WIESENTHAL CENTER, INC., RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE and CITY OF LOS ANGELES,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DOES A MEMBER OF A HOLOCAUST REVISIONIST GROUP, WHO HAS BEEN SUBJECTED TO CLASS-BASED, INVIDIOUS DISCRIMINATION BECAUSE OF HIS VIEWS ON A SUBJECT OF POLITICAL IMPORTANCE, STATE A CLAIM UNDER 42 U.S.C. SECTIONS 1985(3) AND 1986 WHEN HE HAS BEEN DELIBERATELY DEPRIVED OF FREEDOM OF SPEECH BY LOCAL GOVERNMENT AND PRIVATE PARTY CO-CONSPIRATORS WHO ENGAGED IN THREATS OF VIOLENCE AND DISRUPTION, INTIMIDATION, AND IMPOSITION OF POLITICAL AND ECONOMIC SANCTIONS?

2. DOES THE FACT THAT THE CONSPIRATORS' CLASS-BASED ANIMUS WAS WHOLLY NONRACIAL, BUT POLITICALLY MOTIVATED PREVENT A MEMBER OF A GROUP SUBJECT TO INVIDIOUS DISCRIMINATION FROM STATING A CLAIM UNDER 42 U.S.C. SECTIONS 1985(3) AND 1986, WHEN LOCAL GOVERNMENT WAS A CO-CONSPIRATOR AND THE SOLE OBJECT OF THE CONSPIRACY WAS TO DEPRIVE HIM OF FREEDOM OF SPEECH?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the California Library Association and the Westin Hotel Company, d/b/a Westin Bonaventure Hotel, appeared as defendants in the District Court and as defendants-appellees in the Court of Appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended on January 24, 1992, is reprinted as Appendix A. The opinion, as amended, is reported at 955 F.2d 1214. The original opinion is reported at 919 F.2d 538. The memorandum opinion of the United States District Court for the Central District of California is unreported and is reprinted as Appendix B. The dissenting opinions from the Ninth Circuit's rejection of suggestions for rehearing en banc are reprinted as Appendix F, and are reported at 955 F.2d 1214.

JURISDICTION

The decision of the Court of Appeals was originally filed on November 20, 1990. An amended decision was filed on January 24, 1992. Petitions for rehearing were denied on January 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Ku Klux Klan Act, 42 U.S.C. Section 1985(3):

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons

conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The Ku Klux Klan Act, 42 U.S.C. Section 1986:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

STATEMENT OF THE CASE

David McCalden's[1] claims arose as a result of a conspiracy which led to concerted action, in the form of escalating pressure tactics, including threats and intimidation, taken by Simon Wiesenthal Center, Inc. ("SWC"), Rabbi Marvin Hier ("Hier"), The American Jewish Committee ("AJC") and the City of Los Angeles ("City") in order to coerce the California Library Association ("CLA") to cancel McCalden's contracts for presentation of an exhibit and program at the CLA's 86th Annual Conference. McCalden was a Holocaust revisionist; however, the purpose of his exhibit and program was not to discuss the Holocaust, but to display censored publications and to discuss efforts to supress the speech of Holocaust revisionists. Acts taken in furtherance of the conspiracy include: direct communication of threats of violence, disruption and property damage; specific actions designed to increase the likelihood that these things would happen; intimidation by refusal to provide police protection after police confirmation that threats of violence were serious; and the imposition of political and economic sanctions. The conspirators' actions were motivated by a class-based, invidiously discriminatory animus against McCalden because he was a Holocaust revisionist. The conspirators acted solely for the purpose of preventing McCalden from associating with or expressing his views about free speech and the Holocaust to CLA members.

This petition concerns two claims, under 42 U.S.C. Sections 1985(3) and 1986, which the District Court dimissed with prejudice under Rule 12(b)(6), F.R.Civ.P. The dismissal of these claims was affirmed by the Ninth Circuit.[2] Issues potentially related to these claims are raised in SWC, Hier, AJC and

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[1]David McCalden, now deceased, was originally the plaintiff in this action. Viviana McCalden, as administrator of David McCalden's estate, was substituted as plaintiff-appellant on July 15, 1991.

[2]The District Court's dismissal of claims for breach of contract, interference with contract and violation of California's Unruh Act was reversed by the Ninth Circuit. The District Court's order dismissing a 42 U.S.C. Section 1983 claim was vacated and the claim was remanded for further consideration. *See*, Appendix A.

City's petition for writ of certiorari, dated April 9, 1992, docket number 91-1643.

Statement of Facts

In 1984, McCalden entered into two written contracts with the CLA, one for presentation of an exhibit entitled "Publishers of revisionist, libertarian and athiest research. Specializing in the defense of civil liberties for unpopular causes," and the other to present a program entitled "Free Speech and the Holocaust — An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject." (A63)[3] The exhibit and program were scheduled as part of the CLA's 86th Annual Conference which was to be held at Los Angeles in December, 1984. (A63)

Prior to the Annual Conference, McCalden's participation came to the attention of SWC, Hier, AJC and City. (A64-67) These parties, with City joining at some point after initial actions were taken, entered into a conspiracy to make a deliberate and concerted effort to organize and effect a campaign of escalating pressure tactics, solely for the purpose of forcing the CLA to cancel its contracts with McCalden and preventing McCalden from associating with or expressing his views to CLA members. (A64-73) SWC, Hier, AJC and City engaged in overt acts of intimidation and threats,[4] including: (1) meeting privately with the CLA to inform them directly that if McCalden's contracts were not cancelled the Annual Conference would be disrupted, there would be property damage and the CLA would be "wiped out" (A65); (2) making extortionate threats to the CLA by threatening and organizing a demonstration which they knew and intended would create a reasonable probability of property dam-

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[3]"A" shall refer to the Appendices attached hereto, followed by the page number.

[4]These parties are jointly and severally liable for the acts of their co-conspirators. *United States v. Socony-Vaccum Oil Co.*, 310 U.S. 150, 253-54 (1940).

age and of violence against McCalden and CLA members, and then offering to remove the threat if the CLA cancelled its contracts with McCalden and publicly dissociated itself from him (A67); (3) increasing the likelihood of violence and intimidation by informing militant, violence-prone Jewish organizations about McCalden's exhibit and program in order to encourage these groups to disrupt McCalden's program and the Conference (A67-68); (4) intimidating the CLA and McCalden by informing the CLA, through the Los Angeles Police Department, that there would be violent demonstrations, and then informing the CLA that City would not provide adequate police protection or security for the Annual Conference (A70-71); (5) increasing the likelihood of violence and intimidation by inducing the Westin Bonaventure Hotel to rent SWC a conference room next to the room where McCalden's program was to be presented, so they could disrupt the program (A66); and (6) intimidating the CLA by informing its executive director, through the Los Angeles Police Department, that the police had received death threats against him if he allowed McCalden to speak and that these threats were "real," and then informing the CLA director that City would not provide adequate police protection or security for the Conference (A70-71).

In furtherance of the conspiracy, SWC, Hier, AJC and City also engaged in overt acts of political and economic sanctions, including: (1) getting California Assembly Speaker Willie Brown, California Senate President David Roberti and other public officials to aid and abet the conspiracy by pressuring the CLA to cancel McCalden's program and exhibit (A68); (2) having Los Angeles Mayor Tom Bradley instruct the Los Angeles Library Commission to boycott the CLA's Annual Conference (A68); and (3) having the Los Angeles City Council pass a resolution publicly condemning the CLA and imposing severe economic sanctions by severing all ties with the CLA (A65-66).

The City Council's resolution is tantamount to a bill of attainder because it targeted Holocaust revisionists for their unpopular views. The City Council stated that it was taking this action because the CLA had not given in to protests from SWC, AJC and others, thus indicating a clear intent to join with private

parties in their conspiracy to prevent McCalden from expressing his views. Such intent is further indicated by the fact that the Council conducted its debate without notice to McCalden and without making any effort to verify the sweeping allegations on which the resolution was based. (A69-70, ER49-53 — transcript of Council meeting)[5] The full text of the Council resolution (ER48), which was incorporated in McCalden's complaint as Exhibit D, is as follows:

> WHEREAS, the CALIFORNIA LIBRARY ASSOCIATION is meeting in Los Angeles on December 1 to 5, 1984; and
>
> WHEREAS, the California Library Association has invited five speakers who are outspoken in their denial of the World War II Nazi Holocaust; and
>
> WHEREAS, the California Library Association has failed to respond to protests from the American Jewish Committee, the Simon Wiesenthal Center, Survivors of the Holocaust, a wide spectrum of Los Angeles' communal leadership and citizens of all faiths:
>
> THEREFORE, BE IT RESOLVED that the Los Angeles City Council goes on record that while we must protect the right of all Americans to express their views, there is no obligation to provide the forces of hatred such respected platforms. We therefore call on the California Library Association to recognize their grave error of judgment and urge them to remove these individuals from their program.
>
> FURTHER, that whatever City participation in the California Library Association, formal or informal, be immediately severed in protest of the California Library Association action.

After all of the foregoing actions were taken, the CLA gave up and cancelled its contracts with McCalden, and McCalden was

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[5]"ER" shall refer to Excerpts of Record filed in the Ninth Circuit on August 15, 1988, followed by the page number.

not permitted to attend or to express his views concerning free speech and the Holocaust at the Annual Conference. (A65-74)

All of the foregoing actions were taken against the CLA and McCalden solely because of McCalden's membership in a class known as Holocaust revisionists. (A72) This is a small, despised group whose position is that available facts and scientific analysis do not support the popular perception that the Holocaust was a planned extermination of Jews and other persons by the Nazis. (A72-73) Holocaust revisionists have been subject to invidious discrimination, including summary termination of employment for expressing revisionist views, physical attacks, fire bombings, obscene phone calls, threats, intimidation and harassment. (A73) The discrimination was class-based and was intended to supress the free exercise of legal rights in circumstances similar to those of victims of Ku Klux Klan violence prior to 1871. (A73)

The views of Holocaust revisionists have generated an ongoing controversy in the United States and the world. (ER49) Revisionists have sought to participate in respected academic conferences. (ER50) They publish their views. (A63,73) Their questioning or even denial of the Holocaust is a matter of grave concern to a much broader community than just the Jewish community. (ER50) Opponents of Holocaust revisionists believe that unless a major effort is made to remind people of what occurred, there is a terrible risk that it will happen again. (ER53) Opponents tend to see the controversy as a battle against the forces of hatred or anti-Semitism, as the just versus the unjust, as the truth versus suppressors of the truth, and as a struggle to educate people who weren't born before the Holocaust. (ER49-54)[6,7]

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[6]From transcript of Los Angeles City Council proceedings, incorporated in McCalden's complaint as Exhibit E.

[7]The profound political and moral importance of the Holocaust is eloquently expressed by Alan M. Dershowitz in *Chutzpah* (1991) p. 130: "The Holocaust changed the nature of Judaism and of Jews forever. It changed the way Jews look at non-Jews and vice versa. It changed the way every compassionate person views justice and injustice. It should challenge the faith of every thinking being." Nevertheless,

JURISDICTION IN THE COURT OF FIRST INSTANCE.

The jurisdiction of the United States District Court for the Central District of California was invoked under 28 U.S.C. Sections 1331, 1332 and 1343 (1)(2)(3) and (4), and under principles of pendent jurisdiction to consider claims arising under state law. (A61)

Holocaust revisionists question many of the historical facts upon which such statements are based. (A72) As Judge Kozinski states, remembrance of the Holocaust has become a political cause. (A45) Federal and state governments are actively involved. *See, e.g.*, Executive Order No. 12093, 43 F.R. 51377 (1978) (establishing President's Commission on the Holocaust); Presidential Proclamation No. 4652, 44 F.R. 19369 (1979) (Days of Remembrance of Victims of the Holocaust); Executive Order No. 12169, 44 F.R. 62277 (1979) (establishing United States Holocaust Memorial Council); Presidential Proclamation No. 4747, 45 F.R. 25037 (1980) and Public Law 96-233, 94 Stat. 332 (1980) (Days of Remembrance of Victims of the Holocaust); Public Law 96-388, 36 U.S.C. Section 1401 *et seq.* (1980) (establishing United States Holocaust Memorial Council); Presidential Proclamation 4838, 46 F.R. 23193 (1981) (Days of Remembrance of Victims of the Holocaust); Public Law 101-300, 104 Stat. 205 (1990) (authorizing appropriation of $5,000,000 to pay to respondent SWC's Museum of Tolerance the federal share of cost of designing and operating Holocaust education programs); Nevada Revised Statutes, Section 233G.010 *et seq.* (1989) (establishing Governor's Advisory Council on Education Relating to the Holocaust); New Jersey Statutes Annotated, Section 18A:4A-1 (1991) (establishing New Jersey Commission on Holocaust Education). Holocaust revisionists oppose this kind of legislation to the extent it forecloses free and open inquiry into the historical record as, for example, by designating the Holocaust "a crime virtually without equal in history" (Presidential Proclamation 4747, *supra*) and limiting participation in a commission on Holocaust education to experienced Holocaust educators or prominent spokespersons or leaders of groups which were subjected to human rights violations by the Nazis (New Jersey Commission on Holocaust Education, *supra*).

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUITS BY HOLDING THAT A CLAIM CANNOT BE STATED UNDER 42 U.S.C. SECTION 1985(3) UNLESS THE PLAINTIFF IS A MEMBER OF A CLASS THAT THE GOVERNMENT HAS DETERMINED NEEDS SPECIAL FEDERAL ASSISTANCE IN PROTECTING THEIR CIVIL RIGHTS.

A. The Decision Below Conflicts With Decisions Of This Court Because It Is Not Based On An Analysis Of The Intent Of The Framers Of The Statute.

The opinion below (Norris, J.) held that McCalden failed to state a claim under 42 U.S.C. Section 1985(3) because Holocaust revisionists are not a class that has been "singled out for special federal protection." (A12) This holding was based on application of the Ninth Circuit rule that the plaintiff in a Section 1985(3) case must be a member of a class that the government has determined requires and warrants special federal assistance in protecting their civil rights. (A12) The Ninth Circuit rule includes classes that courts have designated as "suspect" or "quasi-suspect" or that Congress has indicated through legislation require special protection. *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985).

This Court, on the other hand, has based its Section 1985(3) rulings on whether a particular class was one that Congress sought to protect in 1871. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 834-839 (1983). The two groups specifically cited in *Carpenters* as having been considered for protection by the 42nd Congress were "Negroes and those who championed their cause, most notably Republicans," i.e., a group subject to conspiracies motivated by racial animus and groups subject to conspiracies motivated by political animus. *Id.*, at 836. *Carpenters* held that groups subject to conspiracies motivated by economic animus

were not entitled to Section 1985(3) protection. *Id.*, at 837-839. The Court in *Carpenters* found it a difficult question whether Section 1985(3) provided a remedy for wholly nonracial, but politically motivated conspiracies, i.e., the situation presented here, not because of doubt that at least some political groups were intended to have been protected by the 42nd Congress, but because of concern that protection of political groups in general would tend to make federal courts the monitors of campaign tactics in both state and federal elections. *Id.*, at 835-837.[8] This Court has never suggested that political groups should not have a Section 1985(3) remedy merely because the government had not previously determined that they needed special federal protection.

The Ninth Circuit's rule is in conflict with *Carpenters* because it extends Section 1985(3) protection to classes that the 42nd Congress had no intention of protecting and denies protection to a class that was intended to be protected. Aside from the class question, the facts of this case present the exact type of situation that Section 1985(3) was intended to prevent.

B. The Decision Below Conflicts With Decisions Of Other Circuits Which Do Extend Section 1985(3) Protection To Political Groups.

Because this Court has not resolved the issue whether wholly nonracial, but politically motivated conspiracies are subject to Section 1985(3) and, if anything, has added to the uncertainty on this point,[9] the law in the circuits is now in complete disagreement. The result in this case would have been different if it had been decided in the Sixth Circuit and probably if it had been decided in the Second Circuit or (more uncertain) the Eighth Circuit.[10]

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[8]That concern is addressed below, at pages 14,16-17.

[9]Justice White's majority opinion in *Carpenters* expressed serious reservations, but four justices joined in Justice Blackmun's strong dissent, which has been cited with approval in several circuits.

[10]The result would have been the same in the Fourth and Fifth Circuits, but the basis for the holding would have been completely different: *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155,

The Sixth Circuit, in a post-*Carpenters* decision, held that a conspiracy motivated by animus against the purely political activities of a Democrat was subject to Section 1985(3). *Conklin v. Lovely*, 834 F.2d 543, 548-49 (6th Cir. 1987). The court found that *Carpenters* left open the question whether Section 1985(3) covered nonracial, wholly political animus and therefore followed *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973), which held that it did.

The Second Circuit, in *Keating v. Carey*, 706 F.2d 377, 386-388 (2nd Cir. 1983), held that Republicans were a protected class under Section 1985(3) and in dicta stated that Congress sought to protect not only Republicans, but to prohibit political discrimination in general. In *Gleason v. McBride*, 869 F.2d 688, 694-95 (2nd Cir. 1989), the court cited *Keating* as the law of the circuit, but did not reach the question whether *Carpenters* limited *Keating*, since the plaintiff had not alleged he was a victim of class-based animus. In *N.Y. State Nat. Organization for Women v. Terry*, 886 F.2d 1339 (2nd Cir. 1989), the Second Circuit implicitly adopted the approach recommended in the *Carpenters* dissent when it stated that Section 1985(3) protected political associations and held that it protected women as a class: "By its very language Section 1985(3) is necessarily tied to evolving notions of equality and citizenship. As conspiracies directed against women are inherently invidious, and repugnant to the notion of equality of rights for all citizens, they are therefore encompassed under the Act. ***** It is likewise untenable to believe that Congress would provide a statutory remedy against private conspiracies, the purpose of which is to deny rights common to every citizen, and exclude women as a class from the shelter of its protection. We therefore hold that women may

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160-62 (4th Cir. 1985) (political groups not protected because statute probably should not be extended beyond groups covered in *Griffin*, i.e., blacks); *Deubert v. Gulf Federal Sav. Bank*, 820 F.2d 754, 757 (5th Cir. 1987) (only conspiracies motivated by racial animus are actionable under Section 1985(3)); *but see, McLean v. International Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (classes characterized by inherited or immutable characteristic or by political beliefs and associations are protected).

constitude a class for purposes of Section 1985(3)." *Id.*, at 1359. In *Terry*, the defendants used public demonstrations to intimidate and block access to clinics by women seeking abortions.

Decisions in the Eighth Circuit are essentially the same as the decisions in *Keating* and *Gleason*. *See, Means v. Wilson*, 522 F.2d 833, 839-840 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976) (Section 1985(3) protects right to vote in tribal elections, political dissidents constituted a class); and *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) (did not reach questions whether *Carpenters* limited *Means* because plaintiff failed to allege a conspiracy).

The Seventh Circuit has stated that, "Section 1985(3) extends beyond conspiracies to discriminate against persons based on race to conspiracies to discriminate against persons based on sex, religion, ethnicity or political loyalty." *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988), *citing Munson v. Friske*, 754 F.2d 683, 695 (7th Cir. 1985). The position of the Seventh Circuit is unclear, however, due to *Grimes v. Smith*, 776 F.2d 1359, 1363 (7th Cir. 1985) where "purely private, purely political" voter fraud was held not to be actionable under Section 1985(3). In *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989) the court cited both *Volk* and *Grimes* and held that "conspiracies animated by *both* racial and political motives were still within the scope of Section 1985(3)'s coverage." *Id.*, at 592 (emphasis in original) . The court held that Section 1985(3) covered conspiracies motivated by racial animus toward whites. *Id.*, at 593. *Triad* involved a campaign of economic sanctions, intimidation and harrassment to drive white employees and contractors from the ranks of the Chicago Housing Authority and to replace these with blacks who supported the political aspirations of Mayor Washington's administration. *Id.*, at 585.

The *Triad* approach allowing politically motivated conspiracies to be covered by Section 1985(3) when there is also some degree of racial animus has been used in other circuits. The District of Columbia Circuit has held that Section 1985(3) protects a class of "Black and White civil rights workers and White supporters of their efforts" from an F.B.I. dominated conspiracy "to drive a wedge into an alliance of civil rights workers and peace groups"

by means of actions "sufficiently related to race to place the conspiracy within even the narrowest reading of section 1985(3)." *Hobson v. Wilson,* 737 F.2d 1, 22-24 (D.C.Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985). No finding was made that the conspirators were motivated by racial animus, however, but rather that their actions "were undoubtedly aimed at plaintiffs at least in part on account of [the plaintiffs'] *racial politics,*" *i.e.,* involvement in political issues of concern to blacks, such as opposition to construction of superhighways because of displacement of poor blacks, black civil rights and high casualty figures among blacks in the Vietnam War. *Id.,* at 22 (emphasis in original). The F.B.I., among other things, was trying to defuse a possible massive march on Washington that might have resulted in confrontation with authorities, and it inexcusably circulated a leaflet which attempted, through racist language and pictures, to create racial discord among black and white anti-war protesters. *Id.,* 23. The conspirators' animus was overwhelmingly political.

In *Martinez v. Winner,* 771 F.2d 424 (10th Cir. 1985), *vacated on other grounds,* 475 U.S. 1138 (1986), the plaintiff alleged that defendants conspired against him because of his political and social beliefs, and activities on behalf of his own and other national minorities, and because he was Mexicano. The Tenth Circuit held that this allegation indicated a racial and political animus. The principal wrongdoing was a conspiracy to arrange secretly for a mistrial so that the United States would get another chance to convict the plaintiff. The finding of racial animus, which cannot be correct since "Mexicanos" are not a race but an ethnic group, was made specifically to avoid a challenge under *Carpenters, Id.,* at 440. The defendants' animus was essentially political.

From the point of view of the victim of a wholly nonracial, politically motivated conspiracy, the distinction in *Hobson* and *Martinez* between "purely political" and "political with racial overtones" looks arbitrary and fortuitous, especially where the government is a co-conspirator. Should the result really be completely different if the defendants' wrongful conduct is the same but their class-based animus is somewhat different? Such a

state of the law does nothing but discriminate unfairly among political groups.[11]

A better solution is to adopt, at least for political groups, the position taken by Justice Blackmun in the *Carpenters* dissent: "In my view, Congress intended to provide a federal remedy for all *classes* that seek to exercise their rights in unprotected circumstances similar to those of the victims of Klan violence. Instead of contemplating a list of actionable class traits, though, Congress had in mind a functional definition of the scope of Section 2. * * * * * Congress intended to provide a remedy to any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities. While certain class traits, such as race, religion, sex and national origin, *per se* meet this requirement, other traits may also implicate the functional concerns in particular situations." *Carpenters, supra* at 851 and 853 (emphasis in original). Using a functional approach, the presence of local government as a co-conspirator would be an important factor in determining whether a claim involved unprotected circumstances similar to those of victims of Klan violence. So would the presence of violence or intimidation by threats of violence. Claims that meet these criteria need and deserve the protection of federal courts. Granting a Section 1985(3) remedy for such claims would not make federal courts the monitors of ordinary political campaign tactics.

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[11]And perhaps unconstitutionally as well. All political groups should be entitled to equal protection in the exercise of First Amendment rights. *See, Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *see also, University of California Regents v. Bakke*, 438 U.S. 265, 289-90 (1978) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.") "This fundamental principle of fourteenth amendment jurisprudence is instructive in our decision today. Though we are not bound by its precedent in our interpretation of Section 1985(3), we are persuaded by its logic." *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583, 593 (7th Cir. 1989).

II

THIS IS A FIRST AMENDMENT CASE OF EXCEPTIONAL IMPORTANCE BECAUSE IT INVOLVES CONCERTED, CLASS-BASED, INVIDIOUSLY DISCRIMINATORY ACTION BY LOCAL GOVERNMENT IN CONSPIRACY WITH PRIVATE PARTIES TO DEPRIVE A MEMBER OF A DESPISED AND POWERLESS GROUP OF HIS RIGHT TO SPEAK.

Judge Reinhardt described this case as arising in the context of a bitter political dispute (A47) and Judge Kozinski criticized McCalden for being a sore loser in a political struggle and for "dragging his adversaries into court," merely because they succeeded in depriving him of freedom of speech. (A39) In his dissent from the Ninth Circuit's rejection of a suggestion for rehearing en blanc, Judge Kozinski argues that it is an abuse of the legal system to force SWC, Hier and AJC in this action to mount a defense, since this litigation itself will have a chilling effect on *their* exercise of First Amendment rights. (A40-41) But even if they would prefer not to mount a defense, at least these parties will have had an opportunity. That is much more than McCalden got when these same parties conspired with local government to deprive him of his right to speak.

It is fundamentally wrong for private parties to work hand-in-glove with local government to deprive people with unpopular views of freedom of speech. But that is exactly what happened in this case, and in a particularly egregious manner. SWC, Hier and AJC threatened the CLA with disruption, property damage and violence unless it cancelled McCalden's exhibit and program. These parties took definite steps that increased the likelihood of violence and disruption by renting an adjacent conference room and encouraging participation of militant, violence-prone Jewish organizations. City, through the Los Angeles Police Department, intimidated the CLA by refusing to provide police protection after police confirmed to the CLA that threats of violence were serious. Through the Los Angeles City Council, it publicly condemned the CLA and imposed severe economic sanctions against it.

If there is no legal remedy for this type of wrong, then our "marketplace of ideas" will be quickly cornered by the rich, powerful and popular. Organizations such as the CLA will never dare listen to those who are powerless and despised. If, as is said, we are becoming a truly pluralistic society with many interests vying for economic and political power, then it is more important than ever that the demands of every interest be tempered by a healthy respect for the constitutional rights of all Americans. It may be the only thing that will hold our society together. But elected officials have seldom, if ever, been so financially dependent upon, and therefore so subject to influence by, so-called special interests. There is clearly no political liability for elected officials to deprive someone like McCalden of First Amendment rights, if it pleases an influential constituent such as SWC, AJC or Hier. Therefore, if the First Amendment is to mean anything, someone like McCalden *has* to have a legal remedy for deprivations resulting from the type of conduct alleged here.

The federal civil rights statutes, 42 U.S.C. Sections 1983, 1985(3) and 1986 ought to provide such a remedy, but after nearly seven years of litigation the Ninth Circuit has declined to decide whether a claim is stated under Section 1983 and has upheld dismissal with prejudice of claims under Sections 1985(3) and 1986. The only ground for dismissal of the 1985(3) claim is that McCalden was not a member of a class that the government had previously determined "requires and warrants special federal assistance in protecting their civil rights." A12)

This cannot be the correct conclusion to be drawn from *Carpenters v. Scott, supra,* in which this Court tried to determine which groups Congress intended to protect in 1871. There can be little doubt that political groups and affiliations were within the contemplation of the 42nd Congress when it passed the Ku Klux Klan Act. *See, Carpenters, supra,* 463 U.S. at 836-38 and 850-51, n. 15. The concern of the majority in *Carpenters* was that extending the protection of Section 1985(3) to political groups would make the federal courts the monitors of campaign tactics in both state and federal elections. 463 U.S. at 836. The facts presented here, however, do not require an open-ended extension of Section 1985(3) to political or other similar groups. The core

of McCalden's claim is that local government joined with private parties in a concerted effort to prevent him from expressing his views on a highly politicized subject, in circumstances similar to those of victims of Klan violence. It is the presence of deliberate state action against a member of a powerless and despised group that makes this case disturbing and that so clearly demonstrates the need for a legal remedy. As Representative Garfield stated in 1871, the act was to be addressed at least in part to the danger caused by a systematic maladministration of the laws, or a neglect or refusal to enforce their provisions. *Carpenters, supra*, 463 U.S. at 851, *quoting,* Cong. Globe, 42nd Cong., 1st Sess., App. 153 (April 4, 1871). City's casual disregard of McCalden's First Amendment rights makes this a case where the 1985(3) remedy is entirely appropriate.

III

THE ADDITIONAL REMEDY PROVIDED IN 42 U.S.C. SECTION 1986 OUGHT TO BE AVAILABLE AS A DETERRENT TO PARTIES WHO HAVE THE POWER TO PREVENT DEPRIVATIONS OF CONSTITUTIONAL RIGHTS, BUT WHO DO NOT HESITATE TO DO OTHERWISE.

If WSC, Hier, AJC or City had refrained from or opposed the course of conduct alleged here, it is likely the conspiracy would have failed. The CLA would have stood its ground and McCalden would have presented his exhibit and program. But rather than preventing or aiding in preventing a deliberate deprivation of McCalden's freedom of speech, each of these parties chose to join the conspiracy.

The fact that a Section 1986 claim cannot be stated unless a Section 1985 claim is also stated is an additional reason for careful reconsideration of the applicability of Section 1985(3).

CONCLUSION

To maintain a democratic, pluralistic society, all political groups must be protected in their exercise of First Amendment rights. 42 U.S.C. Section 1985(3) was intended to protect such groups from deprivation of First Amendment rights in circumstances similar to those of victims of Klan violence in 1871. That protection should be extended equally to all political groups, not just those involved in "racial politics" or having some other racial characteristic.

Respectfully submitted,

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APPENDIX A

VIVIANA MCCALDEN,* *Plaintiff-Appellant*, v. CALIFORNIA LIBRARY ASSOCIATION; CITY OF LOS ANGELES; AMERICAN JEWISH COMMITTEE; MARVIN HIER; SIMON WIESENTHAL CENTER, INC.; WESTIN HOTEL CO., dba Westin Bonaventure Hotel, *Defendants-Appellees*.

No. 88-5727

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

May 3, 1989, Argued and Submitted, Pasadena, California
January 24, 1992, Filed

OPINION

NORRIS, Circuit Judge:

Appellant David McCalden filed an eight-claim second amended complaint alleging breach of contract, tortious interference with contract, deprivation of constitutional rights, and violation of California's Unruh Civil Rights Act. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. McCalden appeals.

According to the allegations of his complaint, appellant is a member of an organization that engages in research, writing, publication and discussion questioning the historical accuracy of the accepted portrayal of the Holocaust. In July 1984, appellant entered into a contract with appellee California Library Association ("CLA") to rent exhibit space at the association's annual conference scheduled for December 1984 at the Westin Bonaventure Hotel in Los Angeles. Appellant described the exhibit on his application form as one of "Publishers of revisionist, libertarian and atheist research. Specializing in the defense of civil liberties for unpopular causes."

In August 1984, appellant entered into an additional written contract with appellee CLA for the presentation of a program entitled "Free Speech and the Holocaust" - An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject" at the same conference.

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* By this court's order of July 15, 1991, Viviana McCalden was substituted as plaintiff-appellant for David McCalden.

After appellant entered into the contracts with CLA, appellees allegedly engaged in a series of acts designed to prevent him from presenting his proposed exhibit and program. He alleges that appellee American Jewish Committee ("AJC") contacted representatives of the CLA and informed them that if appellant's contracts were not cancelled, the conference would be disrupted, property would be damaged, and the CLA would be "wiped out." Appellee City of Los Angeles ("City"), acting through its City Council, passed a unanimous resolution to request that the CLA remove appellant from the conference and to sever the City's participation with the conference. This resolution was allegedly based upon representations of Councilman Yaroslavsky at the specific request of one of his constituents, appellee Rabbi Marvin Hier. In addition, the Los Angeles Police Department informed the Director of the CLA that it had received threats against his life if he allowed appellant to participate in the conference. The City also informed the Director that it would be unable to provide adequate police protection or security measures for the conference.

Appellee Simon Wiesenthal Center, at the direction of Rabbi Hier and with the approval of the AJC, allegedly rented a conference room from appellee Westin Bonaventure Hotel which was adjacent to the room in which appellant's program was scheduled to take place. Appellant alleges that the principal reason Simon Wiesenthal Center rented the adjacent room was to position itself so as to disrupt his program. He also alleges that Westin Bonaventure Hotel knew the rental of the room to the Simon Wiesenthal Center would constitute a breach of its agreement with appellee CLA to provide adequate security.

Appellant alleges that he believes appellees deliberately and in concert caused CLA to cancel its contracts with him, through the application of political pressure and threats.

I. *Jurisdiction*

Initially, we must determine whether we have jurisdiction to hear this appeal. Appellant must file a notice of appeal within 30 days after entry of judgment. Fed. R. App. P. 4(a)(1). A timely notice of appeal is jurisdictional. *Allah v. Superior Court*, 871 F.2d 887, 890 n.1 (9th Cir. 1989). Appellees claim that appellant's appeal is untimely.

On February 11, 1987, the district court dismissed appellant's first, second, fifth, sixth and seventh claims with prejudice. The court granted leave to amend with respect to the fourth claim, but cautioned that it would "impose sanctions for the filing of a frivolous pleading." Excerpts of Record ("ER") at 15. On March 24, 1987, the district court dismissed the fourth claim with prejudice, because appellant had not amended his complaint within the time allowed. On March 31, 1987, appellant stipulated to dismiss without prejudice his third and eighth claims against the city. With this final stipulation, each of his eight claims had been dismissed. On June 19, 1987, appellant filed a motion requesting the court to enter judgment in his case. On July 30, 1987, the court, in an order, refused to enter judgment on the ground that its former orders constituted entry of judgment. Appellant filed a notice of appeal February 10, 1988.

Rule 4(a)(6) provides that the time for appeal does not start running until a judgment is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, that is, until it is set forth in a separate document and properly entered by the clerk of the court.[1]

Appellees argue, and the district court held, that the time for appeal began to run when the court filed the final stipulation on March 31, 1987. The court relied on *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980), and *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981), for authority that a case becomes appealable once all claims against all defendants have been finally dismissed. While it is true that *Baker* and *Anderson* are authority for the proposition that appellant's case became appealable on March 31, 1987, and therefore that appellant *could* have appealed after that date, it does not necessarily follow that the 30-day time period began to run on that date. The time period begins to run only by the entry of a "judgment . . . set forth on a separate document."[2] Fed.

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[1] Fed. R. Civ. P. 58 states in relevant part: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."

[2] Although a separate judgment is required for the time limit to appeal to begin running, it does not follow that a separate judgment is necessary to create appellate jurisdiction; the parties may waive the requirement, avoiding the " 'pointless exercise of dismissing the appeal and waiting for the district

R. Civ. P. 58. The reason for this rule, so apt in this case, was stated by the Supreme Court in *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978)(per curiam):

> The separate-document requirement was . . . intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely.

For purposes of Rule 4(a), in order to make the finality of a case as unequivocal as possible, our circuit has held that the separate-document rule be "mechanically applied," or else a "party will not ordinarily be found to have exceeded any of the time periods [of Rule 4(a)]." *Allah v. Superior Court*, 871 F.2d at 890 (quoting *Vernon*, 811 F.2d at 1276). *See also Carter v. Beverly Hills Sav. & Loan Ass'n*, 884 F.2d 1186 (9th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3834 (1990)(civil minutes entered in docket book do not constitute final judgment unless separate order filed and all formalities observed).

The district court's various orders did not constitute an "entry of judgment" in this case, because no separate document of judgment was entered. Although the district court's July 30 order refusing to enter judgment gave appellant notice that the district court considered his claims to be finally dismissed, the order also suggested, mistakenly, that appellant's time for appeal had already run. Since the very purpose of Rule 4(a) is to avoid confusion, we cannot hold, Magritte-like, that an order stating that "this is not an entry of judgment" is nonetheless an entry of judgment. Our circuit has held fast to a mechanical application of the "separate judgment" rule, requiring all formalities to be observed. *See Carter, supra*. Therefore, the time for appeal never began to run, and appellant's appeal is timely.

We review *de novo* the dismissal of an action under Rule 12(b)(6) for failure to state a claim. *Patee v. Pacific Northwest Bell Tel. Co.*, 803 F.2d 476, 477 (9th Cir. 1986).

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court clerk to enter a separate judgment.'" *Allah v. Superior Court*, 871 F.2d at 890 n.1 (quoting *Vernon v. Heckler*, 811 F.2d 1274, 1276-77 (9th Cir. 1987)); *Bankers Trust Co. v. Mallis*, 435 U.S. at 385.

II. *Breach of Contract Claim*

Appellant asserts a state law breach of contract claim against the CLA, claiming that it breached its two contracts with appellant, one for the rental of exhibition space and the second for the rental of a conference room in which appellant planned to present a program expressing his views on the Holocaust. In support of this claim, appellant alleged that the CLA cancelled the contract ostensibly because of threats of disruption to the convention if appellant were allowed to exhibit and speak, but that "the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support . . . as a result of action taken by defendant CITY OF LOS ANGELES . . . ." ER at 21. In later claims, however, appellant alleged that the CLA received substantial threats of violence and that the police declined or were unable to provide adequate protection. *See, e.g.*, ER at 23-31.

The district court dismissed the breach of contract claim, holding that appellant had pled an impossibility defense to his own claim by his allegations in other sections of the complaint. ER at 4-7. We cannot agree.

The issue here is one of alternative pleading. Federal Rule of Civil Procedure 8(e)(2) explicitly provides, in relevant part, that "[a] party may . . . state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." Fed. R. Civ. P. 8(e)(2). Our circuit has held that "[i]n light of the liberal pleading policy embodied in Rule 8(e)(2) . . . a pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case." *Molsbergen v. United States*, 757 F.2d 1016, 1019 (9th Cir.), *cert. dismissed*, 473 U.S. 934 (1985). Following *Molsbergen* and the clear mandate of Rule 8(e)(2) requires that we reverse the dismissal of appellant's breach of contract claim, because the district court's dismissal was based on an impermissibly strict reading of his complaint.

In any event, the allegations in appellant's complaint do not plead a complete impossibility defense to his own claim. For a complaint to be dismissed because the allegations give rise to an affirmative defense "the defense clearly must appear on the face of the pleading." 5A C. Wright & A. Miller, Federal Practice and

Procedure, § 1357, at 348-49 (2d ed. 1990). A party invoking the impossibility defense must show that he used reasonable efforts to surmount the obstacles which prevented performance. *See Oosten v. Hay Haulers Dairy Employees & Helpers Union*, 45 Cal. 2d 784, 789, 291 P.2d 17, 21 (1955) (defendant invoking impossibility defense required to show affirmatively that performance was impossible or unreasonably expensive despite exercise of skill, diligence and good faith), *cert. denied sub nom Knudsen Creamery Co. of California v. Oosten*, 351 U.S. 937 (1956); *see also* B. Witkin, Summary of California Law § 786 (1987); Restatement (Second) of Contracts § 261 comment (d) (1981). Here, appellant's complaint does *not* clearly state that the CLA took reasonable measures to obviate the danger from groups that opposed appellant (*e.g.*, by insisting on police protection, hiring extra security guards or instituting special security procedures.) Hence, when we consider the allegations in all sections of the complaint, appellant does not plead a complete impossibility defense. Accordingly, we vacate the dismissal of the breach of contract claim.

III. *Interference with Contractual Relationship Claim*

Appellant's second claim alleges that the City, the AJC, Rabbi Hier, the Wiesenthal Center and Westin tortiously interfered with appellant's contractual relationship with the CLA. The district court dismissed this claim with prejudice, holding that this cause of action required the plaintiff to allege that " 'some identifiable pecuniary or economic benefit' accrue[d] to defendants that formerly accrued to plaintiff." ER at 7 (quoting *Garter-Bare Co. v. Munsingwear Inc.*, 723 F.2d 707, 716 (9th Cir. 1984).

As we read California law, pecuniary or economic benefit is not an element of the tort of interference with a contractual relationship. A recent California Supreme Court case, which the district court may not have had the benefit of, has not identified this element when listing the essential components of this claim. *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990) (listing elements which plaintiff must plead to state cause of action for intentional interference with contract, and not including accrual of economic benefit to defendant).[3] Since such benefit is not an

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[3] We express no opinion as to the elements of the related tort of

essential component of this claim, appellant's failure to plead it does not defeat his claim, which must be reinstated.[4]

IV. *Unruh Act Claim*

The district court dismissed with prejudice appellant's claim under § 51.7 of the California Civil Code, on the ground that appellant did not fall within a group protected by that statute.

Cal. Civ. Code § 51.7(a) as amended in 1984, provides in relevant part, as follows:

> All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

The district court found that a group of "Holocaust revisionists" was not a political affiliation under the terms of the statute. However, appellant claims on appeal that he is nonetheless a member of a class that is subject to invidious discrimination, whether or not labeled political, and that because the statute's list is meant to be "illustrative rather than restrictive," he should be protected by it.

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interference with prospective economic advantage. *See, e.g., Garter-Bare Co. V. Munsingwear Inc.*, 723 F.2d 707, 716 (9th Cir. 1984) (quoting *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449, 1456 (9th Cir. 1983))(identifying as essential element of tort of interference with prospective economic advantage as "some identifiable pecuniary or economic benefit [that] must accrue to [defendant] that formerly accrued to [plaintiff]"); *see also Pacific Gas*, 50 Cal. 3d at 1126 (noting differences between these two torts).

[4] It is clear, of course, that none of the appellees can be liable for petitioning the Los Angeles City Council or for organizing a demonstration against McCalden. These activities are plainly protected by the First Amendment. *See Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984); *Brownville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988). Speech or conduct that falls outside the protection of the First Amendment, on the other hand, may expose appellees to liability for interference with contractual relations.

Appellees argue that the "illustrative rather than restrictive" language on which appellant relies was added to the statute *after* the events in this case, and was an enlargement of the statute's protections. The limited legislative history of the amendment is ambiguous as to whether it was intended to clarify the section or to alter it. In addition, there is only one published California case that does more than mention § 51.7 in passing, and it does not address the issue raised by the district court here. (*Coon v. Joseph*, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987)). The California courts, however, have considered § 51.7 to be a "component" of the earlier-enacted Unruh Civil Rights Act, Cal. Civ. Code § 51. *See Long v. Valentino*, 216 Cal. App. 3d 1287, 1293, _ Cal. Rptr. _ (1989)(as modified on rehearing).

The Unruh Act, Cal. Civ. Code § 51, prohibits discrimination by business establishments on the basis of sex, race, color, religion, ancestry, or national origin. Despite this more restricted list, and the absence of any legislative statement that the list is not exclusive, the California courts have construed § 51's list of classes as "illustrative rather than restrictive." *In re Cox*, 3 Cal. 3d 205, 216, 474 P.2d 992, 999, 90 Cal. Rptr. 24, 31 (1970). Given that the legislative amendment to § 51.7 tracks this language, and the *Cox* case was cited in the Assembly Bill analysis,[5] it is reasonable to infer that the amendment was a codification of *Cox*'s pronouncement. At the very least, the California courts' approach to § 51 guides us in the analysis of § 51.7 as an indication of what the California courts might do in this case. *See S & R Metals, Inc. v. C. Itoh & Co.*, 859 F.2d 814, 816 (9th Cir. 1988) (in absence of express guidance, federal court must apply state law as it predicts state's highest court would).

The California courts have defined the classes of the Unruh Act very broadly to include "individuals who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union," *In re Cox*, 3 Cal. 3d at 217-218, students, families with children, welfare recipients, and occupational groups. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 736, 640 P.2d 115, 124, 180 Cal. Rptr. 496, 505, *cert. denied* 459 U.S. 858 (1982).

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[5] Appellant's Brief, Addendum at 16.

Appellant describes himself as a member of a class of "Holocaust Revisionists," who are subject to invidious discrimination because they spread unpopular views about the history of the Holocaust. ER 35. Appellees claim that appellant's expulsion from the CLA conference was not due to his being a member of an unpopular group, but was because of his "spreading lies." They argue that lying is conduct, not membership in a group, and therefore appellant does not fall within the protection of the Unruh Act. *See Frantz v. Blackwell*, 189 Cal. App. 3d 91, 96, 234 Cal. Rptr. 178, 181 (1987) (discrimination reasonably based on a person's conduct, as opposed to his status, not prohibited by the Unruh Act; Act aims for individualized treatment).

On a motion to dismiss, however, the court must deem the complaint's allegations to be true. *Williford v. California*, 352 F.2d 474, 475-76 (9th Cir. 1965). Appellant alleges that he is a member of a group espousing unpopular views. A John Birch Society or ACLU member could fall in the same kind of class, and the *Cox* decision is explicit that those groups would receive the protection of the Unruh Act.

Appellees also argue that the complaint does not sufficiently allege intimidation by threat of violence committed to plaintiff's person or property, as required by § 51.7. Liberally construed, the complaint contains one allegation of a specific threat - the AJC's alleged statement to the CLA, "at the urging and request and with the knowledge, approval and cooperation of Defendants Marvin Hier . . . and Simon Wiesenthal Center" that if the contracts with appellant were not canceled, [d]efendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be 'wiped out.' " ER at 23. Appellees claim that this language can be construed only as a threat against the CLA, not against the person or property of appellant. They cite *Coon v. Joseph*, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987), in which the court held that the plaintiff, a gay man, could not state a § 51.7 claim against a bus driver by alleging that his lover was verbally abused and struck in his presence. The court stated:

> The complaint establishes that no violence or intimidation was committed or threatened against [plaintiff's] person and thus no cause of action exists in his own right. Following [plaintiff's] argument, any person would have the right to

> recover damages for himself or herself whenever the rights of any other human being of similar . . . sexual orientation were threatened.

Id. at 1277-78.

On a motion to dismiss, all reasonable inferences are to be drawn in favor of the non-moving party. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). Appellant alleges that the appellees intended to disrupt his presentation by creating a demonstration that appellees knew and intended "would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA." ER 10-11. In view of all the facts pled, it is reasonable to infer that any property damage or injury threatened could be directed against appellant, because the allegations clearly link the alleged threat to an intent to disrupt appellant's exhibit and program. This case must therefore be distinguished from *Coon*, because it can be reasonably inferred from the complaint that the threatened violence was directed against appellant.

Although appellees suggest that the statute must be read as requiring the threat to be conveyed directly to the person threatened,[6] the statute requires only that the plaintiff be intimidated by threat of violence committed against his person or property. In construing a remedial state statute, on a motion to dismiss, in the absence of clear state court direction, this court is reluctant to read any unnecessary restrictions into § 51.7.

Finally, some appellees raise a First Amendment defense to this cause of action, arguing that there can be no liability for alleged threats of violence unless they were "directed to inciting or producing imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). We reject this argument. Both *Brandenburg* and *Claiborne* involved public speeches advocating violence, not privately communicated threats of violence as are

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[6] The only mention in the complaint of a threat conveyed to McCalden was the second-hand information that the CLA "had received threats of substantial disruption to the conference and to the property of *other* exhibitors should [McCalden's] program be allowed to be presented." E.R. 21 (emphasis added).

alleged here. Privately communicated threats have traditionally been punishable where they have "a reasonable tendency to produce in the victim a fear that the threat will be carried out." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983).

That appellees were engaging in protected expressive activities at the same time and to the same end as the alleged threats of violence does not immunize appellees from liability for the alleged threats. In *Claiborne*, the Court held that NAACP official Charles Evers could not be held liable for a public speech, but the Court stated unequivocally that individuals who "engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused." *Claiborne*, 458 U.S. at 926. Nor does the fact that appellees were politically motivated immunize them from liability if they in fact engaged in threats of violence. The boycotters who threatened and engaged in violence in *Claiborne* were no less politically motivated than Charles Evers whose public speech the Supreme Court held to be protected by the First Amendment. *Id.*; *see also Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987) ("a statement that amounted to a threat to kill the President would not be protected by the First Amendment"). Appellant may not be able to support the allegations in his complaint, but those allegations are sufficient to survive a motion to dismiss.

V. *Section 1985(3) Claim*

Appellant also asserts a claim under 42 U.S.C. § 1985(3),[7] averring that five of the defendants[8] conspired to deprive him of his civil rights "solely because of his membership in a class known as Holocaust revisionists," a "class" the members of which he claims are subject to invidious discrimination because of their views. ER at 35. We must decide whether appellant's self-identified "class"

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[7] The statute reads, in relevant part:
If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[8] Defendant CLA was not named in this part of the complaint.

falls within the ambit of classes § 1985(3) has been interpreted to protect.[9]

Building upon the Supreme Court's jurisprudence on this issue,[10] our circuit has distilled a rule that to state a claim under § 1985(3) "the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights." *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1519 (9th Cir. 1987); *see also Trerice v. Pedersen*, 769 F.2d 1398, 1402-03 (9th Cir. 1985) (principle underlying § 1985(3) is governmental determination that some groups require and warrant special federal assistance in protecting their civil rights); *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (per curiam) (same); *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 72 (9th Cir.) (same), *cert. denied*, 454 U.S. 967 (1981); *DeSantis v. Pacific Telephone & Telegraph Co., Inc.*, 608 F.2d 327, 332-33 (1979) (same). It is against this standard that appellant's claim must be tested.

Appellant attempts to fulfill § 1985(3)'s class-based animus requirement by alleging animus against the class of individuals holding particular unpopular historical views. Given our circuit's standard for fulfilling § 1985(3)'s requirement of class-based animus, we cannot accept his argument that the animus against the class of "Holocaust revisionists" satisfies this requirement as our circuit has interpreted it. Appellant makes no argument that Holocaust revisionists have been singled out for special federal protection. We therefore affirm the dismissal of appellant's § 1985(3) claim.

VI. *Section 1986 Claim*

As appellant himself concedes, "[a] claim can be stated under § 1986 only if the complaint contains a valid claim under § 1985."

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[9] The requirement that an actionable conspiracy must feature class-based animus was enunciated by the Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). For the other elements of a Section 1985(3) action, none of which are treated here, see *Griffin*, 403 U.S. at 102-03.

[10] *See United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983)(limiting types of class-based animus fulfilling element of Section 1985(3) claims); *Griffin*, 403 U.S. 88 (1971) (setting forth original requirement of class-based animus).

Appellant's Brief at 60. *See, e.g., Karim-Panahi v. Los Angeles Police Dep.*, 839 F.2d 621, 626 (9th Cir. 1988). Thus, our affirmance of the dismissal of appellant's § 1985(3) claim requires us to affirm as well the dismissal of his claim under § 1986.

VII. *Section 1983 Claim*

In its order of February 11, the district court dismissed appellant's fourth claim without prejudice, on the ground that it failed to state the "Constitutional or statutory basis for the alleged wrong." ER at 10. This claim was dismissed with prejudice on March 24 on the ground that appellant had not attempted to amend his complaint.

The district court's February 11 dismissal without prejudice was error. Appellee is not required to state the statutory or constitutional basis for his claim, only the facts underlying it. *See Haddock v. Board of Dental Examiners of California*, 777 F.2d 462, 464 (9th Cir. 1985) (complaint "should not be dismissed if it states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory"). Moreover, appellant explicitly mentions 42 U.S.C. § 1983 in the first paragraph of his complaint, which is incorporated by reference in his fourth claim, and his fourth claim tracks the language of § 1983. On remand, the district court should consider whether appellant has stated a claim under § 1983.[11]

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[11] Appellees urge that we must reach the merits of whether appellant has stated a § 1983 claim, citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). While they are correct that an appellate court must affirm a district court's decision if correct, even though the district court's reasoning is flawed, we have already held that the district court's judgment must be reversed in part and the case remanded for further proceedings. Thus, the rationale for the *Helvering* rule that it "would be wasteful to send a case back to a lower court to reinstate a decision which it had already made," *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), is inapplicable. Because the § 1983 claims here may involve constitutional issues that have not been adequately briefed on appeal, we exercise our discretion to allow the district court to consider these claims in the first instance. *See I.A. Durbin, Inc., v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1552-53 (11th Cir. 1986) (having determined that district court's dismissal of some claims was improper, court refused to reach merits of other constitutional claims and merely pointed out district court's improper reasoning, because constitutional issues were inadequately briefed, and because of general principle against unnecessary decision of constitutional questions.)

The City argues that appellant's failure to amend precludes his appeal, because he has, by his silence, acquiesced in the earlier dismissal without prejudice. However, appellant is not required to amend in order to preserve his right to appeal. When one is granted leave to amend a pleading, she may elect to stand on her pleading and appeal, if the other requirements for a final, appealable judgment are satisfied. *See* 15 C. Wright & A. Miller, Federal Practice and Procedure § 3914 (1976); 3 J. Moore, Federal Practice ¶ 15.11 (2nd Ed. 1989).

VIII. *Motion for Reassignment*

Appellant moves that this case be remanded to a different district judge on the ground that he believes Judge Marshall to be biased against him. As evidence of this alleged bias, appellant complains that the district court 1) mischaracterized his views; 2) intentionally refused to enter judgment in order to delay appellant's appeal; 3) improperly threatened appellant with sanctions in the event that a third amended complaint was frivolous; 4) improperly ordered appellant to show cause why his remaining claims against Los Angeles should not be dismissed, when there was no evidence of lack of prosecution; 5) ignored appellant's application to file documents pending admission of his counsel to practice in the Central District of California; and 6) falsely accused counsel of making an improper communication to the court.

Remand by this court to a different district judge, in the absence of proof of personal bias, is granted only in "unusual circumstances." *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1523 (9th Cir. 1985). In making this determination, we may consider

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. (quoting *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979). Adverse rulings alone are not sufficient to require recusal,

even if the number of such rulings is extraordinarily high. *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1341 (9th Cir. 1984). The instant case varies markedly from *United States v. Jacobs*, 855 F.2d 652, 656-57 (9th Cir. 1988), cited by appellant. In *Jacobs*, in addition to making erroneous rulings, the district judge had repeatedly disparaged the movant's case and counsel, and had offered advice to the opponent.

The examples of the district court's conduct appellant gives here do not come close to a showing of bias. Appellant's motion for reassignment is denied.

IX. *Conclusion*

We affirm the district court's dismissal of appellant's claims under § 1985 and § 1986; we reverse the district court's dismissal of the contract, interference with contract, and Unruh Act claims; we vacate the district court's order dismissing the § 1983 claims, and we remand for further proceedings consistent with this opinion. Finally, we deny appellant's motion that the case be remanded to a different district judge.

FLETCHER, Circuit Judge, Dissenting:

I respectfully dissent. We should not reach the merits of this appeal. Rule 4 requires that an appellant file a notice of appeal within 30 days after a final judgment has been entered in accordance with Fed. R. Civ. P. 58. Fed. R. App. P. 4(a)(1), (6). Absent a timely filed notice of appeal, we have no jurisdiction. *Miller v. Sumner*, 872 F.2d 287 (9th Cir. 1989); *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983) (en banc).

The district court dismissed McCalden's last claim on March 31, 1987, almost a full year before McCalden filed his notice of appeal. Moreover, the district court, by order on July 30, 1987, more than seven months before McCalden filed his appeal, explicitly informed McCalden that the order entered on March 31, 1987 unquestionably and finally disposed of his case and that the court would issue no further judgment. At the very latest, McCalden was obligated to file his notice of appeal within 30 days of this order. McCalden's notice of appeal at a minimum was filed almost six months too late.

The majority holds that the 30-day period for filing an appeal never began to run because the district court failed to enter a final judgment that met the requirements of Fed. R. Civ. P. 58. Specifically, the majority finds that the district court failed to set forth its judgment on a separate piece of paper. *See* Fed. R. Civ. P. 58. This elevates form over policy and, indeed, over all common sense.

The purpose of the separate document rule is to ensure that litigants know precisely when a judgment is final. It therefore removes uncertainty about when litigants must file an appeal. *See* Fed. R. Civ. P. 58 (comment)(separate document requirement instituted to remove uncertainties as to when a judgment is entered); 11 C. Wright & A. Miller, § 2781, at 6 (1973) (describing purpose of Rule 58). The order denying McCalden's request for entry of judgment, entered by the district court on July 30, 1987, fulfills this purpose.[1] It communicates precisely the information that a final judgment is supposed to communicate only it does so explicitly. First, it states that the judgment of the district court with respect to *all* claims is final. Second, it explicitly denies appellant's request for an entry of judgment, and thereby clearly notified McCalden that no further judgment would issue. Once this order was entered,

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[1] The July 30, 1987 Order stated, in relevant part:

"By this order [the March 24, 1987 order dismissing McCalden's fourth claim], the court dismissed with prejudice all of plaintiff's actions against all of the defendants, except for the City of Los Angeles.

Although the above orders dismissing the action with prejudice as to certain claims and certain defendants may not be deemed final without certification pursuant to Rule 54(b), an order of dismissal may be treated as final if the remaining claims have been finalized by subsequent developments. . . . Here, subsequent to the issuance of the orders of February 6 and March 24 dismissing certain claims and certain defendants, plaintiff voluntarily submitted a stipulation entered into with the remaining defendant, the City of Los Angeles to dismiss the action pursuant to F. R. Civ. P. 41(e). This court signed the stipulation on March 26, 1987. The clerk's office filed the order on March 30, 1987 and entered the order on March 31, 1987. Therefore, after the issuance of this order, there were no remaining claims nor defendants to the action.

Although plaintiff would not have been able to appeal his own voluntary dismissal of the last defendant, plaintiff could and should have filed his notice of appeal with respect to the court's orders of February 6 and March 24th shortly after he filed the stipulation dismissing the remaining claims and defendant in this action."

McCalden knew the district court case was over; he had absolutely no reason to delay filing his appeal. His only possible uncertainty was that he might already be too late.

Although the July 30 order does not expressly direct *entry* of judgment on the dismissed claims, it explains that this has already happened. To find this insufficient, indeed, does inappropriately "elevat[e] . . . form over substance." *Hamilton v. Nakai*, 453 F.2d 152, 155 (9th Cir. 1971); *see also United States v. Perez*, 736 F.2d 236, 238 (5th Cir. 1984)(per curiam) ("We are not required to 'mindlessly' apply Rule 58"); *Weinberger v. United States*, 559 F.2d 401, 402 (5th Cir. 1977) (same). In the Supreme Court's words, "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action . . .,' " *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962).

McCalden knew his July 30, 1987 case was over and that the order was the final piece of paper the district court would enter. He should have filed his notice of appeal not later than August 30, 1987. Yet he waited until February of 1988. We should dismiss the appeal for lack of jurisdiction.

APPENDIX B

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California Corporation, CITY OF LOS ANGELES, AMERICAN JEWISH COMMITTEE, a New York Corporation, MARVIN HIER, an individual, WESTIN HOTEL CO. OF UAL, INC., a corporation d/b/a WESTIN BONAVENTURE CENTER, INC., a California corporation, *Defendants*.

No. CV86-4755 CBM

United States District Court, Central District of California

February 11, 1987, Entered

Memorandum Opinion Granting Moving Defendants' Motion to Dismiss.

This matter is before the court on the motions to dismiss the first amended complaint for failure to state a claim filed by defendants California Library Association, American Jewish Committee, Westin Hotel Company, Westin Bonaventure Hotel, Simon Wiesenthal Center, and Rabbi Marvin Hier,[1] and, plaintiff David McCalden's motion to file a second amended complaint to cure certain admitted deficiencies of the first amended complaint.

A hearing was held on November 17, 1986 before the Honorable Consuelo B. Marshall, United States District Court Judge, presiding. The court having considered the pleadings submitted and the arguments of counsel, hereby issues the following memorandum opinion granting plaintiff's motion to file a second amended complaint and granting moving defendants' motion to dismiss.[2]

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[1] The motion for change of venue filed by defendant City of Los Angeles primarily sought to have the action transferred to the Central District of California, and requested in the alternative that the action be dismissed. As the City's motion is centered on the change of venue, it does not raise any arguments concerning the insufficiency of plaintiff's claims.

[2] Due to the circumstances in which the motions came before the court, the court analyzed the proposed second amended complaint in order to assess

FACTS AND PROCEDURAL HISTORY

Plaintiff David McCalden filed his original complaint on October 11, 1985 in the United States District Court of the Eastern District of California, and prior to the filing of responsive pleadings, plaintiff filed a first amended complaint on November 27, 1985. Shortly thereafter, defendants filed their respective motions to transfer venue to the United States District Court for the Central District of California contemporaneously with their respective motions to dismiss. The Honorable Raul A. Ramirez granted defendants' motion to transfer venue, and in view of such transfer, ruled that it would be inappropriate to reach the merits of the remaining motions. Accordingly, this action was transferred to the Central District.

After this action was transferred to the Central District of California, plaintiff filed a motion for leave to file a second amended complaint on October 1, 1986 in order to cure certain admitted deficiencies in the first amended complaint.

According to plaintiff's second amended complaint, the following facts are alleged: plaintiff David McCalden, d/b/a/ Truth Missions, is a citizen of the United Kingdom and a legal permanent resident of the United States. Plaintiff is a member of an organization which engages in research, writing, publication and discussion to advocate the position that the Holocaust is merely a hoax and that the genocide of the Jews by the Nazis has never occurred. On or about July 19, 1984, plaintiff entered into a contract with defendant California Library Association (CLA") to rent exhibit space at CLA's 86th Annual Conference scheduled for December 1984 at the Westin Bonaventure Hotel in Los Angeles. Plaintiff described the exhibit on his application form as "Publishers of revisionist, libertarian and atheist research. Specializing in the defense of civil liberties for unpopular causes."

On or about August 17, 1984, plaintiff entered into an additional written contract with defendant CLA for the presentation of a program entitled "Free Speech and the Holocaust - An overview from several speakers of the severe censorship and intellectual

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whether the proposed changes cured the defects raised in defendants' pleadings. Thefore, the court's decision granting defendants' motion to dismiss certain claims therefore applies to those claims enumerated in the second amended complaint.

terrorism which inhibits any objective, open discussion of this controversial subject" at the same conference.

After plaintiff entered into the contracts with CLA and prior to the conference, defendants allegedly engaged in a series of acts designed to prevent plaintiff from presenting his proposed exhibit and oral presentation. Defendant American Jewish Committee contacted representatives of CLA and informed them that if plaintiff's contracts were not cancelled, the conference would be disrupted, property would be damaged, and CLA would be "wiped out." Defendant City of Los Angeles, acting through its City Council, passed an unanimous resolution to request that CLA remove plaintiff from the conference and to sever the City's participation with the conference. This resolution was based upon representations of Councilman Yaroslavsky at the specific request of one of his constituents, defendant Rabbi marvin Hier. In addition, the City of Los Angeles, acting through its Police Department, informed the Director of CLA that they received "real" death threats against him if he should allow plaintiff to participate in the conference and that the City of Los Angeles would be unable to provide adequate police protection or security measures for the conference, participants of the conference, or the CLA representatives.

Defendant Simon Wiesenthal Center, at the direction of Rabbi Hier and with the approval of American Jewish Committee, allegedly rented a conference room from defendants Westin Bonaventure Hotel which was adjacent to the room in which plaintiff's program was scheduled to take place. Plaintiff believes that the principal reason Simon Wiesenthal Center rented the adjacent room was to position itself so as to disrupt plaintiff's program. Plaintiff also believes that Westin Bonaventure Hotel knew the rental of the room to the Simon Wiesenthal Center would constitute a breach of its agreement with defendant CLA to provide adequate security to the conference area.

Plaintiff believes that defendants participated in a deliberate and concerted effort through the application of political pressure and threats of political sanctions to force CLA to cancel its contracts with plaintiff, and as a result of defendants' actions, CLA cancelled plaintiff's exhibit and program.

DISCUSSION

1. Breach of Contract

In the first cause of action, plaintiff alleges that defendant California Library Association breached two contracts with plaintiff; the first contract involved the rental of exhibit space and the second contract involved the presentation of a program at CLA's 86th Annual Conference scheduled for December 1 through 5, 1984, at the Westin Bonaventure Hotel in Los Angeles. Plaintiff's proposed exhibit was entitled "Publishers of revisionist, libertarian and atheist research. Specializing in the defense of civil liberties for unpopular causes." The proposed program was entitled "Free Speech and the Holocaust -- An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject."

In the first amended complaint, plaintiff alleges the CLA cancelled its reservation of a booth and conference room as a direct result of threats by third parties to disrupt the conference and injure those who appear. In the second amended complaint, plaintiff amends the pleading to state that CLA,

> indicated that it 'had received threats of substantial disruption to the conference and to the property of other exhibitors should . . . [plaintiff's] program be allowed to be presented.' However, the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support, including financial support, as a result of action taken by defendant City of Los Angeles on or about November 16, 1984, in the form of a resolution of the Los Angeles City Council, a copy of which is attached hereto as Exhibit D and incorporated herein by reference.

Although the new allegations in the second amended complaint state that CLA's conduct was intentional and without legal justification, the allegations of the complaint still indicate the existence of an affirmative defense which appears on the face of the complaint. The complaint avers that CLA was informed by the Los Angeles Police Department that "certain militant, violence prone Jewish organizations" had made "plans to attend and disrupt Plaintiff's program and to disrupt Defendant CLA's conference through demonstrations." The LAPD also informed the Director of

CLA that they had received death threats directed against him, and that they would be "unable to provide adequate police protection or security measures for the CLA's annual conference, for the CLA itself, for the Director of CLA, and for Plaintiff." Information was also allegedly communicated to CLA by representatives of the American Jewish Committee, with the cooperation of Marvin Hier and Simon Wiesenthal Center, Inc., that the conference would be disrupted, property would be damaged and CLA would be "wiped out."

The doctrine of impossibility or impracticability operates in limited circumstances to excuse the promisor from commencing performance, or to discharge the promisor from the contract where performance of the contract will "involve a risk of injury to person or property, of one of the parties or of others, that is disproportionate to the ends to be attained by performance." Restatement of the Law, Contracts, §261(d); *see e.g.*, 1 Witkin, Summary of California law, §600(b). In the present action, the allegations indicate that the performance of the contracts could have involved a risk of injury to individuals and property due to threatened criminal activities by third persons, and that the cancellation of plaintiff's exhibit and conference was necessary to forestall threatened criminal activities by third persons which could have resulted in injury to individuals and damage to property. The acute hazard posed by the risks of violence and disruption therefore operated to excuse CLA from the contract.

Notwithstanding the issue of impossibility or impracticability, the application for an exhibit booth expressly reserves to the California Library Association "the right to restrict exhibits that may be objectionable or to order the removal of any portion of an exhibit which in the judgment of the Association is detrimental to or detracts from the general order of the exhibits." Thus, the application, on its face, expressly permits the CLA to remove or restrict exhibits deemed to be objectionable, and provides an alternative justification for CLA's cancellation of the exhibits.[3]

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[3] The court notes that the reservation in the agreement only applies to the removal of exhibits, and does not apply to cancellation of the conference room.

Accordingly, plaintiff's first cause of action for the alleged breaches of contract shall be dismissed with prejudice.

2. Intereference with Contract.

To adequately allege a claim for intereference with contract, plaintiff must allege the following elements: 1) the existence of a specific economic relationship between plaintiff and third parties that may economically benefit plaintiff; 2) knowledge by the defendants of this relationship; 3) intentional acts by the defendants designed to disrupt the relationship; 4) actual disruption of the relationship; and 5) damages to the plaintiff. *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449, 1456 (9th Cir. 1983), *citing Buckaloo v. Johnson*, 14 Cal 3d. 815 (1975). Courts have also required that "some identifiable pecuniary or economic benefit" accrue to defendants that formerly accrued to plaintiff. *Garter-Bare Co. v. Munsingwear Inc.*, 723 F.2d 707, 716 (9th Cir. 1984), *citing Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d at 1456. *See De Voto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d 1340, 1348 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980).

Despite case-law to the contrary, plaintiff takes the position that where defendant's intereference is motivated by malice, spite and ill will, he does not need to plead an accrual of an economic benefit to the defendants. Plaintiff relies upon two cases, *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365 (1975) and *Guillory v. Godfrey*, 134 Cal. App. 2d 628 (1955) in support of its position.

In *Gold*, the court held that appellant had adequately stated a cause of action for intentional intereference with plaintiff's prospective employment as a city controller where the complaint alleged that appellees intentionally mailed a deceptive pamphlet to prospective voters prior to the election which gave the appearance that a different candidate was endorsed by the Democratic Party. As a result of this intentional intereference, plaintiff was not elected to the position. This case is inopposite to plaintiff's contention since the pecuniary or competitive advantage obtained by the defendant and lost by the plaintiff was the election to the position of the city controller.

In *Guillory*, the court affirmed the judgment in favor of plaintiffs for defendants' malicious interference with plaintiff's business. Plaintiffs in this action were owners of a cafe located in Los

Angeles located next to defendants' liquor store. Whenever prospective customers were about to enter plaintiffs' cafe, defendants would harass the customers by making disparaging racial remarks concerning the owners and its employees. Because of defendants' conduct, plaintiff sustained a substantial loss of business.

Although *Guillory* makes no mention of the pecuniary or competitive advantage obtained by defendant, subsequent cases have determined that some pecuniary or economic benefit must accrue. For instance, in *DeVoto v. Pacific Fid. Life Ins. Co.*, 618 F.2d 1340 (9th Cir. 1980), *cert. denied*, 449 U.S. 869 (1980), the court described the relationship of defendant's motive or purpose to a cause of action for tortious intereference with prospective business advantage. Recognizing that interference inspired by ill will or spite may be tortious, the court stated that:

> [i]n all these instances of contractual or business interference, some identifiable benefit accrues to the defendant which formerly belonged to the plaintiff, be it pecuniary or competitive . . . It is the intentional attainment of an unjust advantage which underlies the requirement that the intereference be improper, . . . and motive or purpose is usually an accurate measure of the advantage the actor sought and of its just or unjust character." Id. at 1348.

This requirement of "some identifiable pecuniary or economic benefit" has been reaffirmed in several other federal decisions applying California law. *See Garter-Bare Co. v. Munsingwear Inc.*, 723 F.2d 707,716 (9th Cir. 1984); *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d at 1456.

Plaintiff's second amended complaint is devoid of any allegations of pecuniary or economic benefit. Instead, the second amended complaint alleges that actions of various defendants were taken for the purpose of creating a threat of political and economic sanction that would force Defendant CLA to cancel its contract with Plaintiff" and that such actions were "motivated solely by fear and hatred of Plaintiff's views concerning the Holocaust" and to "prevent Plaintiff from Associating with or expressing his views to CLA members." Therefore, plaintiff's failure to allege that defendants gained any pecuniary or economic benefit from their actions requires plaintiff's second cause of action for intereference

with contract by dismissed with prejudice.

3. Deprivation of Rights

Plaintiff's fourth claim alleges that the City of Los Angeles, Simon Wiesenthal Center, American Jewish Committee and Rabbi Hier deprivated him of "fundamental rights, privileges and immunities" secured to him by the Constitution and the laws of the United States by their action or inaction in pressuring CLA to cancel the contracts. The main defect of this claim is that plaintiff fails to specifically state the Constitutional or statutory basis for the alleged wrong, and therefore plaintiff's conclusory pleading shall be dismissed without prejudice for failure to state a claim. Although defendants liberally construe this claim to arise under 42 U.S.C. §1983, the examination of this claim in the context of a particular statute is premature.

4. Conspiracy to Interfere with Civil Rights

Plaintiff alleges in his fifth claim for conspiracy to interfere with civil rights that defendants City of Los Angeles, Simon Wiesenthal Center, Rabbi Hier, American Jewish Committee, and the Westin Hotels conspired to violate his rights under §1985(3) by engaging in "an escalating series of threats and inducements intended to force defendant CLA to cancel its contracts with plaintiff."

The statutory basis for plaintiff's claim, 42 U.S.C. §1985(3), provides, in relevant part:

> If two or more persons in any state or territory conspire to go into disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the parties so injured or deprived may have an action for recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In order to state a claim under §1985(3), plaintiff must allege the following: (1) that he is a member of a protected class of persons under the federal equal protection clause; (2) that defendants participated in a conspiracy to deprive him of his rights; (3) that the purpose of the conspiracy was racial or otherwise class-based

invidious discrimination. *See United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1983).

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court determined that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. Since the facts in *Griffin* involved racial animus against blacks and those who supported them, the facts before the Court involved a situation of invidious racial discriminatory intent which was the Legislature's central concern in enacting §1985(3).

In *Carpenters v. Scott*, a construction company and two of its employees brought suit against a trade council, local unions and certain individuals asserting that the defendants conspired to deprive them of their First Amendment right not to associate with a union. In discussing whether a conspiracy motivated by invidiously discriminatory intent other than racial bias could be actionable under §1985(3), the Supreme Court held that §1985(3) could not be construed to reach conspiracies motivated by bias towards others on account of their economic views, status, or activities. In dicta, the Supreme Court withheld judgment on whether §1985(3) should apply to politically motivated conspiracies since the central concern of the statutory provision was designed to combat "the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Carpenters v. Scott*, 463 U.S. at 837 (Blackmun, J., dissenting).

The Ninth Circuit has extended §1985(3) claims beyond race "only when the class in question can show that there has been a governmental determination that its members 'require and warrant special federal assistance in protecting their civil rights.'" *Schultz v. Sundberg*, 759 F.2d 714,718 (9th Cir. 1985)(transitory coalition of state representatives held not to be a protected class); *see e.g., Trerice v. Pedersen*, 769 F.2d 1398,1402 (9th Cir. 1985)(military prisoners held not to be a protected class). In order to allege a non-racial §1985(3) claim, this circuit requires that the class be designated by the courts as either a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress indicate through legislation that the class requires special protection. *Id.*; *see DeSantis v. Pacific Telephone & Telegraph*

Co., 608 F.2d 327, 333 (9th Cir. 1979); *accord Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 771, 720 (9th Cir. 1981).

In his second amended complaint, plaintiff avers that he is a member of

> a class known as Holocaust revisionists. The members of said class, numbering several thousand in North America and Europe, engage in research, writing, publication and discussion. Their aims and activities in the United States are lawful. Their position with regard to the Holocaust is, in general, that available facts and scientific analysis do not support the popular perception of the Holocaust as a planned extermination of Jews and other persons by the Nazis. ¶ The views of Holocaust revisionist are extremely unpopular in most of Europe and North America. Because of their views, Holocaust revisionists themselves have been subject to invidious discrimination, not only with respect to their efforts to express their views but also in their jobs, businesses, schools and homes.

As presently alleged in the second amended complaint, plaintiff alleges animus based upon unpopular and repugnant views concerning the mass extermination of the Jewish people by the Nazis during World War II. The court finds that plaintiff's allegations, as presently alleged, fail to adequately allege that he is a member of a suspect or quasi-suspect class which is subject to protection under §1985(3). Therefore, the fifth cause of action for conspiracy shall be dismissed with prejudice.

5. Neglect to Prevent Conspiracy

Plaintiff's sixth cause of action is based on 42 U.S.C. §1986 which renders actionable certain failures to prevent conspiracies arising under §1985. Since this circuit adopts the principle that a claim under 42 U.S.C. §1986 cannot stand absent a valid claim for relief under §1985, this claim must also be dismissed with prejudice. See Trerice v. Pedersen, 769 F.2d at 1403.

6. Seventh Claim - Violation of Unruh Civil Rights Act

Plaintiff's seventh claim alleges that the actions allegedly undertaken by defendants American Jewish Committee, Westin Hotels, Rabbi Hier[4] and Simon Wiesenthal Center, were undertaken because of plaintiff's "race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, in violation of Section 51.7 of the California Civil Code," and thus violate the Unruh Civil Rights Act.

California Civil Code §51.7(a) as amended in 1984, provides, in relevant part, as follows:

> All persons within the jurisdiction of this state have the right to be free from any violence or intimidation by threats of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. *The identification in this subdivision of particular basis of discrimination is illustrative rather than restrictive*. (emphasis in original).

In his opposition, plaintiff invokes the protections of this statute on the grounds that defendants' actions were committed because of his "political affiliation or membership in a group subject to invidious discrimination." These conclusory allegations, however, fail to identify the *political* affiliation with which plaintiff is affiliated since the second amended complaint merely states that he is a member of a group of "Holocaust revisionists."

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[4] Rabbi Hier raises a separate defense that his actions were constitutionally protected under the First Amendment guarantee of the right to petition the government for redress of grievances and also invokes the absolute privilege under Cal. Civil Code §47(2) which protects any statement in any legislative proceeding or "in the initiation or course of any other proceeding . . ." This absolute privilege provision is said to apply to City Council members and to those concerned citizens who communicate with their City Council and cannot be defeated by an allegation of malice. *See Scott v. McDonnell Corp.*, 37 Cal. App. 3d 277,288 (1974); *see also, Brody v. Montalbano*, 87 Cal. App. 3d 725 (1978), *cert. denied*, 444 U.S. 844 (1979). In light of the court's findings and conclusions regarding the other defects of the complaint, the court will not address the individual defenses raised herein.

The purpose of the Unruh Civil Rights Act was to provide a remedy for those individuals subject to the denial of civil rights or discrimination because of their race, religion, national origin, or other classes of suspect or quasi-suspect classifications. As presently plead, the complaint fails to identify any political affiliation, or otherwise state that plaintiff is a member of any class subject to protection under the Act. Therefore, the seventh claim shall also be dismissed with prejudice.

7. Request for Sanctions and Attorney's Fees

Defendants Simon Wiesenthal Center and Rabbi Hier request the court to impose sanctions pursuant to F.R.Civ.P. 11 against the plaintiff for the filing of an action that is without legal or factual basis, and in addition, request attorney's fees pursuant to Rule 11 and 42 U.S.C. §1988. Defendants contend that this lawsuit is vexatious, frivolous and that plaintiff filed to this action in order to harass the defendants.

In order to award attorneys fees to moving defendants pursuant to 42 U.S.C. §1988, the court must find that plaintiff's civil rights action is frivolous, unreasonable, or without foundation. *Jensen v. Stangel*, 762 F.2d 815,817 (9th Cir. 1985); *see Sherman v. Babbitt*, 772 F.2d 1476,1478 (9th Cir. 1985). A similar standard is imposed pursuant to Rule 11. At this juncture, the court believes it has insufficient evidence to support such findings, and therefore the court declines to award attorney's fees at this time.

CONCLUSION

Based upon the above discussion, the court summarizes its order as follows:

1) Plaintiff's motion to file a second amended complaint is granted and the second amended complaint is deemed filed;

2) Plaintiff's first, second, fifth, sixth and seventh claims are dismissed with prejudice for failure to state a claim upon which relief can be granted, and;

3) Plaintiff's fourth cause of action is dismissed without prejudice. Plaintiff shall have 20 days from the filing date of this order to file a third amended complaint which cures the deficiencies of the fourth cause of action as set forth in this order. If plaintiff

fails to timely file a third amended complaint, the fourth cause of action shall be deemed dismissed with prejudice. The court, however, cautions plaintiff that the court will apply the standards set forth in 42 U.S.C. §1988 and F.R.Civ.P. 11 in reviewing any amended complaint, and will impose sanctions for the filing of a frivolous pleading.

The only claims remaining in the instant lawsuit are the third and eighth causes of action against the City of Los Angeles.

DATED: FEBRUARY (6), 1987

(signed)
CONSUELO B. MARSHALL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,
vs.
CALIFORNIA LIBRARY ASSOC., a California Corporation, CITY OF LOS ANGELES, AMERICAN JEWISH COMMITTEE, a New York Corporation, MARVIN HIER, an individual, WESTIN HOTEL CO. OF UAL, INC., a corporation d/b/a WESTIN BONAVENTURE CENTER, Inc., a California corporation, *Defendants*.

No. CV86-4755 CBM

United States District Court, Central District of California
March 24, 1987, Entered

GRANTING MOVING DEFENDANTS' MOTION TO DISMISS.

On February 11, 1987 this court issued a memorandum opinion granting moving defendants' motion to dismiss which dismissed plaintiff's first, second, fifth, sixth and seventh claims for relief with prejudice; dismissed plaintiff's fourth claim without prejudice; and gave plaintiff twenty days from the filing date to amend his fourth cause of action. In the February 11, 1987 order, this court stated that: "If plaintiff fails to timely file a third amended complaint, the fourth cause of action shall be deemed dismissed with prejudice." As of this date, plaintiff has not filed a third amended complaint.

Defendants Rabbi Marvin Hier, Simon Wiesenthal Center and American Jewish Committee now request the court to dismiss the fourth claim with prejudice and to dismiss moving defendants from the lawsuit with prejudice. The court having reviewed the pleadings, hereby issue the following order:

1) Plaintiff's fourth claim for relief is dismissed with prejudice;

2) Plaintiff's entire lawsuit against defendants Rabbi Marvin Hier, Simon Wiesenthal Center, American Jewish Committee, California Library Association, Westin Hotel Co. and Westin Bonaventure Center, Inc. is dismissed with prejudice; and

3) Plaintiff shall respond in writing within 10 days from the filing date of this order why the remaining action against the City of Los Angeles should not be dismissed for lack of prosecution.

MARCH 23, 1987 (signed)
CONSUELO B. MARSHALL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California corporation, et al., *Defendants*.

No. CV86-4755 CBM (Kx)

United States District Court, Central District of California

March 31, 1987, Entered

STIPULATION AND ORDER FOR DISMISSAL OF CLAIMS WITHOUT PREJUDICE

Plaintiff, DAVID McCALDEN and defendant, CITY OF LOS ANGELES, through their respective counsel, hereby stipulate and agree as follows:

That Plaintiff's Third and Eigth Causes of Action set forth in his Second Amended Complaint be dismissed without prejudice.

This stipulation is submitted pursuant to Rule 41(a), Federal Rules of Civil Procedure.

Dated: (3-11-87)

(signed)
Marcia Haber Camine,
Deputy City Attorney, for
Defendant City of
Los Angeles.

Dated: (3-4-87)

(signed)
Bruce B. Mckee,
Attorney for Plaintiff

IT IS SO ORDERED.

Dated: (26 MAR 87)

(stamped Consuelo B. Marshall)
United States District Judge

APPENDIX E

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California corporation, et al., *Defendants*.

No. CV86-4755 CBM

United States District Court, Central District of California

July 30, 1987, Filed

ORDER DENYING PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT.

Plaintiff David McCalden files the present motion for entry of judgment of the action in order to file an appeal to the Ninth Circuit from this court's order dated February 6, 1987 and March 24, 1987 dismissing certain claims as to certain defendants.[1] Defendants Simon Wiesenthal Center and Rabbi Marvin Hier, joined by defendant California Library Association, file an opposition on the ground the present motion is merely an attempt to revive the lapsed thirty-day limitations period during which plaintiff should have filed a notice of appeal. Defendant City of Los Angeles also files a separate opposition asserting that the motion is an attempt to circumvent the time for filing of a notice of appeal.

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[1] Prior to the filing of the present motion, plaintiff's counsel wrote to this court requesting entry of judgment in a letter dated April 15, 1987. Local Rule 2.10, however, prohibits this form of *ex parte* communication with the court. Local Rule 2.10 provides:

> [a]ttorneys or parties to any action or proceeding shall refrain from writing letters to the judge or otherwise communicating with a judge in a pending matter unless opposing counsel is present. All matters shall be called to a judge's attention by appropriate application or motion filed in compliance with these Local Rules.

Since the letter was in violation of the above Local Rule, the letter was not considered by the court and plaintiff's counsel was informed by the staff that *ex parte* communication of this nature was not permissible.

Initially, the court notes that this action involves a situation where this court dismissed certain claims and certain defendants, and thereafter, plaintiff voluntarily dismissed the remainder of the action. Due to plaintiff's decision to not file a third amended complaint, this case never developed to the point of summary judgment. Nor is this a case where judgment by default was ever requested due to the defendants' responsive pleadings to plaintiff's complaint. Therefore, the case before the court does not involve the usual situation where a judgment is sought by the prevailing party under Rules 55 or 56 of the Federal Rules of Civil Procedure. Instead, the losing party seeks to have a belated entry of judgment in order to appeal from the court's previous dismissals of certain portions of the complaint. Plaintiff has not satisfied the court that there is any authority for this unusual proposition.

This court now turns to when this action became appealable. This court first granted the motions of defendants California Library Association, American Jewish Committee, Westin Hotel Company, Westin Bonaventure Hotel, Simon Wiesenthal Center and Rabbi Marvin Heir in an order dated February 6, 1987.[2] In the order the court found, in part, that the first, second, fifth, sixth and seventh claims failed to state a claim upon which relief could be granted. With respect to these claims, the court determined that plaintiff could not cure the pleading defects and therefore dismissed these claims with prejudice. *See Begsy* 682 F.2d at 1314 ("with prejudice meant no additional amendments would be allowed").

However, the court further found that the fourth amended complaint could be cured, and dismissed the claim *without* prejudice. The court gave plaintiff 20 days from the filing date of the order to file a third amended complaint, and informed plaintiff that the failure to file a timely third amended complaint would result in the dismissal of the fourth cause of action with prejudice.

When plaintiff failed to timely file a third amended complaint, defendants Rabbi Marvin Hier, Simon Wiesenthal Center and American Jewish Committee requested the issuance of an order dismissing plaintiff's entire action as to certain defendants. Plaintiff did not oppose this request, or otherwise seek to have this court

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[2] Since defendant City of Los Angeles did not move to dismiss the complaint, the third and eighth causes of action against the City of Los Angeles were not determined by the order.

certify the issues for appeal pursuant to F.R.Civ.P.54(b).[3] In an order dated March 24, 1987, the court dismissed the fourth claim for relief with prejudice and stated that "[p]laintiff's entire lawsuit against defendants Rabbi Marvin Hier, Simon Wiesenthal Center, American Jewish Committee, California Library Association, Westin Hotel Co. and Westin Bonaventure Center, Inc. is dismissed with prejudice . . ." By this order, the court dismissed with prejudice all of plaintiff's actions against all of the defendants, except for the City of Los Angeles.

Although the above orders dismissing the action with prejudice as to certain claims and certain defendants may not be deemed final without certification pursuant to Rule 54(b), an order of dismissal may be treated as final if the remaining claims have been finalized by subsequent developments. *Anderson v. Allstate*, 630 F.2d 677, 680-81 (9th Cir. 1980)(dismissal of the action as to the remaining defendants rendered the prior order dismissing other defendants as a final appealable order); *see Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981)("judgments whose finality normally would depend upon a Rule 54(b) certificate may be treated as final if remaining claims subsequently have been [sic] finalized, even by developments occurring after appeal"). Here, subsequent to the issuance of the orders of February 6 and March 24 dismissing certain claims and certain defendants, plaintiff voluntarily submitted a stipulation entered into with the remaining defendant, the City of Los Angeles to dismiss the action pursuant to F.R.Civ.P. 41(e). This court signed the stipulation on March 26, 1987. The clerk's office filed the order on March 30, 1987 and entered the order on March 31, 1987. Therefore, after the issuance of this order, there were no remaining claims nor defendants to the action.

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[3] Rule 54(b) of the Federal Rules of Civil Procedure provides that an order adjudicating the rights and liabilities of fewer than all the parties is not final unless the court makes (1) "an express determination that there is no just reason for delay," and (2) "an express direction for the entry of judgment." *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981). Thus, as here, where there are multiple defendants and an order dismissing the action against only some of the defendants, such order is not final for purposes of 28 U.S.C. §1291 without certification pursuant to Rule 54(b). *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980).

Although plaintiff would not have been able to appeal his own voluntary dismissal of the last defendant, plaintiff could have and should have filed his notice of appeal with respect to the court's orders of February 6 and March 24th shortly after he filed the stipulation dismissing the remaining claims and defendant in this action. However, plaintiff did not take such timely action and now seeks to have this court issue a judgment in order for him to appeal this action.

In sum, even if this court had authority to enter a judgment in the present situation, the court concludes that plaintiff's request is untimely. Accordingly, plaintiff's motion is hereby denied.

DATED: JULY (30), 1987

(signed)
CONSUELO B. MARSHALL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F

VIVIANA MCCALDEN,* *Plaintiff-Appellant*, v. CALIFORNIA LIBRARY ASSOCIATION; CITY OF LOS ANGELES; AMERICAN JEWISH COMMITTEE; MARVIN HIER; SIMON WIESENTHAL CENTER, INC.; WESTIN HOTEL CO., dba Westin Bonaventure Hotel, *Defendants-Appellees*.

No. 88-5727

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

May 3, 1989, Argued and Submitted, Pasadena, California
January 24, 1992, Filed

ORDER

The Opinion, filed November 20, 1990, is amended as follows:

(1) By inserting the following footnote on page 14256 of the slip opinion at end of last full sentence before Section IV and renumbering the footnotes:

> [4] It is clear, of course, that none of the appellees can be liable for petitioning the Los Angeles City Council or for organizing a demonstration against McCalden. These activities are plainly protected by the First Amendment. *See Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984); *Brownville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988). Speech or conduct that falls outside the protection of the First Amendment, on the other hand, may expose appellees to liability for interference with contractual relations.

(2) By striking the last paragraph before Section V on page 14260 of the slip opinion.

(3) By inserting the following before Section V on page 14260 of the slip opinion:

Finally, some appellees raise a First Amendment defense to this cause of action, arguing that there can be no liability for alleged threats of violence unless they were "directed to inciting or producing imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *NAACP v. Claiborne Hardware*

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* By this court's order of July 15, 1991, Viviana McCalden was substituted as plaintiff-appellant for David McCalden.

Co., 458 U.S. 886, 927 (1982). We reject this argument. Both *Brandenburg* and *Claiborne* involved public speeches advocating violence, not privately communicated threats of violence as are alleged here. Privately communicated threats have traditionally been punishable where they have "a reasonable tendency to produce in the victim a fear that the threat will be carried out." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983).

That appellees were engaging in protected expressive activities at the same time and to the same end as the alleged threats of violence does not immunize appellees from liability for the alleged threats. In *Claiborne*, the Court held that NAACP official Charles Evers could not be held liable for a public speech, but the Court stated unequivocally that individuals who "engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused." *Claiborne*, 458 U.S. at 926. Nor does the fact that appellees were politically motivated immunize them from liability if they in fact engaged in threats of violence. The boycotters who threatened and engaged in violence in *Claiborne* were no less politically motivated than Charles Evers whose public speech the Supreme Court held to be protected by the First Amendment. *Id.*; *see also Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987) ("a statement that amounted to a threat to kill the President would not be protected by the First Amendment"). Appellant may not be able to support the allegations in his complaint, but those allegations are sufficient to survive a motion to dismiss.

Judge Fletcher, as dissenter, neither joins in nor opposes the amendment to the majority opinion contained in this order.

With the above amendments, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

Upon the vote of the eligible judges in active service, a majority failed to vote for en banc rehearing. Judge Kleinfeld entered upon active service after the requisite date and was not eligible to vote.

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

KOZINSKI, Circuit Judge, with whom Circuit Judges ALARCON, REINHARDT and T.G. NELSON join, dissenting from the order rejecting the suggestion for rehearing en banc.

This is a case of exceptional importance. What began as a political dispute among widely divergent factions has been converted into a lawsuit; thwarted in the political arena, plaintiff McCalden has chosen to continue the battle by dragging his adversaries into court. The fundamental question presented is how much - or rather how little - he need allege before the courts will entertain his case, putting the defendants to the burden, expense and risk of litigation.

The answer to this question is of profound significance at a time when civil litigation is anything but the "just, speedy, and inexpensive" process contemplated by the Federal Rules of Civil Procedure. The federal courts have recognized that lawsuits impinging on speech presumptively protected by the First Amendment are subject to far more stringent pleading requirements than ordinary lawsuits, precisely because protected speech is so precious -- and so fragile -- that it can easily be smothered under piles of document requests, depositions, interrogatories, requests for admission and the other ordnance in the modern litigator's arsenal.

McCalden alleges repeatedly that the defendants used "threats of violence" to thwart him, and on that basis alone does the panel majority let him proceed with his lawsuit. Nowhere, however, does McCalden give a single example of an actionable threat of violence. McCalden's *only* elaboration on his will-o'-the-wisp allegations is that defendants were "threatening and organizing a *demonstration* which [they] knew and intended would create a reasonable probability of property damages and of violence." Second Amended Complaint ¶ 32 (emphasis added). While genuine threats of violence are not constitutionally protected, I had thought it inconceivable that one could be held liable for planning and organizing a political demonstration. By allowing McCalden to proceed with his lawsuit, my colleagues turn back the clock to the dark days of the not-so-distant past when the judicial process was routinely used to crush opposing viewpoints -- an era I, like most observers, believed had ended with *Brandenburg v Ohio*, 395 US 444 (1969).

Background

McCalden is a Holocaust revisionist. He proselytizes the view that the historical record of Nazis murdering millions of Jews and

other civilians on account of their ethnic and religious affiliations is a hoax. In pursuit of his mission, McCalden contracted for exhibit space at the 1984 meeting of the California Library Association, and also planned to give a presentation there.

McCalden's efforts did not go over well with those who were victims of the Holocaust, or whose families, friends or co-religionists were subjected to Nazi atrocities. Particularly incensed by McCalden's proposed participation in the conference were the American Jewish Committee, the Simon Wiesenthal Center for Holocaust Studies and the Center's director, Rabbi Marvin Hier (collectively Wiesenthal). McCalden alleges that the Wiesenthal defendants[1] took a series of actions designed to keep him from showing his exhibit or holding his presentation. He sued, raising a variety of state and federal claims; the district court dismissed them all. Rejecting defendants' argument that their activities were protected by the First Amendment, the panel majority lets McCalden proceed on his claims for interference with contractual relations and under California's Unruh Civil Rights Act, and remands for a determination whether McCalden has pleaded facts sufficient to support a claim under a federal civil rights statute, 42 USC § 1983.

Discussion

A. Civil litigation is a tool for vindicating important rights, but it can also be a bludgeon for striking at political adversaries. *See Grunwald v San Bernardino City Unified School Dist.*, 917 F2d 1223, 1232-33 (9th Cir 1990) (Kozinski, J., dissenting). The classic example is *New York Times Co. v Sullivan*, 376 US 254 (1964), where the police commissioner of Montgomery, Alabama, sought to use state libel law to crush press support for the nascent civil rights movement in the South. *See generally* Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* ch. 5 (1991).

In case after case since *Sullivan* the Supreme Court and our court have recognized that "the pall of fear and timidity imposed [by the threat of litigation] upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms

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[1] McCalden also sued the Library Association, the City of Los Angeles and the hotel in which the meeting was held; my concern here, however, is only with the Wiesenthal defendants.

cannot survive." *Sullivan*, 376 US at 278; *see Oregon Natural Resources Council v Mohla*, 944 F2d 531, 533 (9th Cir 1991). The uncertainties inherent in our imperfect legal system, coupled with the often staggering out-of-pocket costs of obtaining even a favorable judgment, will necessarily do much to deter expression. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 BU L Rev 685, 687-89, 694-701 (1978).

The federal courts have constructed an important series of safeguards to protect First Amendment speakers from such politically motivated litigation. *Sullivan* established the requirement that public officials plead and prove actual malice in libel cases. 376 US at 279-80. *Bose Corp. v Consumers Union*, 466 US 485, 503-11 (1984), directs the courts of appeals to conduct an independent review of the record. *Hustler Magazine, Inc. v Falwell*, 485 US 46, 55 (1988), proscribes the use of a subjective standard "which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." And *Franchise Realty Interstate Corp. v San Francisco Local Joint Executive Board*, 542 F2d 1076, 1082-83 (9th Cir 1976), establishes that "where a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations [in the complaint] than would otherwise be required."

McCalden's complaint falls far short of the First Amendment's specificity requirement. He alleges nothing -- nothing at all -- that could arguably place defendants' speech outside the protective umbrella of the First Amendment: He does not claim that defendants threatened to break anybody's kneecaps, or to plant a bomb, or to have goons set fire to his exhibit. If plaintiff wants to claim that speech uttered by defendants in pursuit of a political objective is extortion, he must allege facts that, if proven, would amount to extortion.[3] One searches McCalden's 24-page complaint in vain for such allegations.

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[3] Commenting on a closely analogous situation, Professor Tribe notes that "more is needed than a ritual incantation of the word 'incitement' before civil or criminal damages may be assessed on the basis of speech." Laurence H. Tribe, *American Constitutional Law* 849 n.58 (2d ed. 1988).

The panel majority's offhanded treatment of this as an extortion case is perturbing. If these defendants -- operating at the core of the First Amendment -- can be subjected to a lawsuit for extortion based on a handful of conclusory allegations, one wonders and worries who else can so easily be dragged into the quagmire of litigation. The press, for example, is a fat target for suits based on vaguely worded complaints alleging "defamation," "invasion of privacy" or some other speech not sheltered by the First Amendment. *See* Rodney Smolla, *Suing the Press* (1986). I had thought it inconceivable that a complaint by a public figure claiming nothing more than that he was "libeled with malice" would survive a motion to dismiss under Rule 12(b)(6). *See*, for example, *Barger v Playboy Enterprises, Inc.*, 564 F Supp 1151, 1154-57 (ND Cal 1983). Now I'm not so sure; if "threats of violence" is a talisman that can whisk a complaint past a motion to dismiss, why not "libel" and "malice" as well? My colleagues' utter disregard for the First Amendment's specificity requirement will bring a chill of discomfort to publishers, editors and political commentators subject to suit in the Ninth Circuit.

B. But we have here far more than merely the absence of specific allegations of unprotected speech: The speech McCalden does specifically allege is fully protected. McCalden's lengthy complaint makes it clear that he and the Wiesenthal defendants were locked in an intense political struggle, waged through the normal political channels: "The *sole purpose* of [the Wiesenthal defendants'] action was to induce Defendant CLA *by application of political pressure and threats of political sanctions* to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to CLA members." Second Amended Complaint ¶ 37 (emphasis added). After describing how the Wiesenthal defendants used their political clout to get him kicked out of the CLA conference,[3] McCalden gives his first and only hint as to what he is talking about when he alleges threats of violence: "[The Wiesenthal defendants] pressured Defendant CLA to cancel its contracts with Plaintiff *by threatening and organizing a demonstration* which [they] knew and

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[3] Wiesenthal's methods, as described at length in the complaint, included meeting with Library Association officials, seeking the support of the city council, renting a conference room next to McCalden's and disseminating information about McCalden's program to other Jewish organizations. Id ¶¶ 22-39.

intended would create a reasonable probability of property damage and of violence." Id ¶ 32 (emphasis added).

By letting McCalden proceed with a lawsuit that hinges on this allegation, the panel holds that a political organization can be sued for extortion on the basis of statements about a demonstration it intends to conduct at some time in the future. This is astonishing in light of *Brandenburg*, which held that a state may not prohibit "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 US at 447.

Since *Brandenburg*, the Supreme Court has given us more precise guidance in *NAACP v Claiborne Hardware Co.*, 458 US 886 (1982). A local branch of the NAACP and concerned black citizens engaged in a boycott of white-owned stores to protest racial inequality. Charles Evers, one of the NAACP leaders, "stated that boycott violators would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night." Id at 902. Evers was also quoted as saying: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." Id. The Court held that a politically motivated boycott was protected by the First Amendment, even where the boycott organizers made statements that might otherwise sound like threats of violence.

Public demonstrations often carry with them the risk of violence. A large group of individuals, united by a common cause and motivated by strong emotions, can get out of control, causing property damage or injury. This is a risk we endure as part of life in a free society; it is not a sufficient reason -- and I hope it never will become one -- to stifle concerted public expression. If the propensity of large groups of angry people to harm property (and sometimes each other) is sufficient to give the target a cause of action against the organizers of the protest, we will have done much to silence the "vehement, caustic, and sometimes unpleasantly sharp attacks" heretofore protected by the First Amendment. *See Sullivan*, 376 US at 270.

What the Supreme Court recognized in *Claiborne Hardware* and *Brandenburg* is that strongly held political views engage the emotions as well as the intellect, and that the participants will often make statements that -- taken out of context -- sound a lot like

threats of violence. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *Claiborne Hardware*, 458 US at 928; see also id at 927 ("mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment") (emphasis in original). As Judge Easterbrook has explained, "[c]ases such as [*Brandenburg*] and [*Claiborne Hardware*] hold that a state may not penalize speech that does not cause immediate injury." *American Booksellers Ass'n, Inc. v Hudnut*, 771 F2d 323, 333 (7th Cir 1985), *affirmed*, 475 US 1001 (1986).[4]

In a belated amendment to its opinion, the panel majority brushes aside *Brandenburg* and *Claiborne Hardware* as cases "involv[ing] public speeches advocating violence, not privately communicated threats of violence as are alleged here." Majority at XXX. My colleagues read these far too parsimoniously. What matters for purposes of the First Amendment is not whether the statements are uttered in public or in private, but whether -- on the basis of what is alleged in the complaint -- the speech in question can fairly be characterized as extortion. *Cf. Watts v United States*, 394 US 705, 707 (1969) (per curiam) (Reversing conviction for hyperbolic statement about shooting President Johnson: "What is a threat must be distinguished from what is constitutionally protected speech.").[5]

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[4] Judge Easterbrook also noted:

> Much speech is dangerous. Chemists whose work might help someone build a bomb, political theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous to speech than all the libel judgments in history.

Id. at 333. Words my colleagues would do well to heed.

[5] Writing for the Seventh Circuit en banc, Judge Posner interpreted *Brandenburg*, *Claiborne Hardware*, *Watts* and other Supreme Court cases to cover situations far more extreme than that here:

> If . . . a new sect of religious fanatics announced that unless Chicagoans renounce their sinful ways it may become necessary to poison the city's water supply, or a newly organized group of white supremacists vowed to take revenge on Chicago for electing a black mayor, these statements, made by groups with no "track record" of violent acts, might well be privileged. Or suppose the leaders of a-

Where the lawsuit grows out of a political dispute, *Claiborne Hardware* teaches that we must be extremely chary of letting one side characterize the other side's angry, sometimes menacing, statements as threats of violence actionable under state law. The political context of the statements matters a great deal.

The context here is framed by plaintiff's complaint. Defendants are the American Jewish Committee, the Simon Wiesenthal Center and Rabbi Marvin Hier: two organizations and an individual deeply committed to a political cause -- remembrance of the Holocaust and its horrors -- not back-alley thugs. Their statements were aimed at achieving a political objective, not exacting protection payments. Read in its entirety, not by plucking phrases out of context, McCalden's complaint alleges nothing more than the type of "uninhibited, robust, and wide-open" debate on public issues the First Amendment protects. *See Sullivan*, 376 US at 270.[6] By dismissing *Brandenburg* and *Claiborne Hardware* in a few scant phrases, my colleagues deliver a body blow to the principle that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 US 138, 145 (1983) (quoting *Claiborne Hardware*, 458 US at 913).

> newly formed organization of Puerto Rican separatists went around Chicago making speeches to the effect that, if the United States does not grant Puerto Rico independence soon, it will be necessary to begin terrorist activities on the mainland United States. These speeches could not, in all probability, be made the basis of a prosecution.

Alliance to End Repression v City of Chicago, 742 F2d 1007, 1014 (7th Cir 1984) (en banc) (citations omitted). In light of *Alliance to End Repression* and *Hudnut*, there is little doubt this case would have come out differently had it been brought in the Seventh Circuit.

[6] In achieving their objectives, defendants expressed their angry disagreement with plaintiff's point of view, and let others know they would be there to protest if McCalden were allowed to participate in the Library Association conference. This no doubt put pressure on the Library Association, which had every interest in avoiding a demonstration that would disrupt its proceedings. But threatening to disrupt an event because it features a speaker to whom protestors object is a common tactic, and has never been held to be actionable. *See* Alan M. Dershowitz, *Taking Liberties* 47-49, 166-68 (1988) (discussing hecklers and demonstrators).

Conclusion

No one disputes McCalden's right to say his piece, repugnant though his message be. The federal courts have a long and proud tradition of protecting the right of individuals with unpopular points of view to express themselves publicly even where this subjects onlookers to intense discomfort, even anger. More than a decade ago, for example, neo-Nazis were allowed to march through the streets of Skokie, Illinois, raising a nationwide furor. *See* Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 323-31 (1990). *See also Texas v. Johnson*, 491 US 397 (1989) (flag burning); *Wooley v. Maynard*, 430 US 705 (1977) (covering up patriotic motto on license plate); *Cohen v. California*, 403 US 15 (1971) (profane political slogan). The discomfort and anger such speech generates is often a crucial part of the message, because effective political advocacy seeks to arouse the emotions, not merely the intellect. As the Supreme Court noted in *Johnson*: "'[Free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" 491 US at 408-09 (quoting *Terminiello v. Chicago*, 337 US 1, 4 (1949)). This is all as it should be.[7]

Surely, however, we may not withhold the same privilege of uninhibited, emotionally charged expression from the targets of McCalden's attack. Those who carry the mark of Auschwitz tattooed on their forearms, or who survived Treblinka, Dachau or Buchenwald; who were hunted down like animals in the streets of Warsaw; who saw loved ones perish during Kristallnacht or in frozen boxcars on their way to the death camps that are the shame and horror of modern times -- they cannot be expected to react calmly, with deliberation, with gentility to one who would tarnish the memory of those butchered in the Holocaust by pretending the whole thing never happened. *See* Alan M. Dershowitz, *Chutzpah*

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[7] Indeed, this is all as it *must* be. Were we to allow limitations on speech because it offends community sensibilities, we would eviscerate the anti-majoritarian protections of the First Amendment. See Martin H. Redish and Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 Cal L Rev 267, 297-304 (1991); *see generally*, Lee C. Bollinger, *The Tolerant Society* (1986).

ch. V (1991).[8] Surely *their* anger, *their* disgust, *their* anguish also has a protected place in the wide-open arena of our public discourse. To let plaintiff use a state civil rights statute (and possibly a federal one as well) to punish these defendants for threatening to hold a demonstration voicing their righteous indignation is not only a perversion of those civil rights laws, it is also a devaluation of the precious rights granted all of us by the First Amendment.

Because I believe the court is perpetrating a grave injustice by allowing this unfortunate precedent to be enshrined as the law of the circuit, I respectfully dissent from the refusal to rehear this case en banc.

REINHARDT, Circuit Judge, dissenting from the order rejecting the suggestion for rehearing en banc.

I join in Judge Kozinski's excellent dissent and agree fully with his analysis and comments. I write separately only in order to emphasize four points, and to add a few observations.

First, this appeal involves circumstances and issues that are similar in many respects to those in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Here, as there, a tort suit arises in the context of a bitter political dispute that pits the just against the unjust. Here, as there, the political dispute generates the strongest of emotions among the victims of racial or religious persecution. Here, as there, the objective of the litigation is to penalize those victims for engaging in first amendment conduct. Far more important, however, in both cases the fundamental legal principle involved, and the fundamental lesson to be learned, are the same: Whenever political discourse -- whether in the form of an advertisement in the New

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[8] Professor Dershowitz points out the profound significance of the Holocaust: "The Holocaust changed the nature of Judaism and of Jews forever. It changed the way Jews look at non-Jews, and vice versa. It changed the way every compassionate person views justice and injustice. It should challenge the faith of every thinking being." *Id.* at 130. Wiesenthal's intense -- and not particularly tolerant -- reaction must be understood in light of this reality.

York Times criticizing the treatment of blacks by Southern officials or a communication to the California Library Association (CLA) threatening a forceful and disruptive demonstration because of the participation of Holocaust revisionists in a CLA exhibit – is the basis for a lawsuit, the courts have a constitutional duty to ensure that the litigation does not become the instrument by which legitimate political speech or activity is stifled.

Second, because the plaintiff seeks to impose liability for speech, his complaint must be subjected to exacting scrutiny. Speech may be chilled not only by an award of damages but also by simply allowing a case to go to trial. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("Fear of large verdicts in damage suits for innocent or merely negligent misstatement, *even fear of the expense involved in their defense*, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.") (quoting *Sullivan*, 376 U.S. at 279) (emphasis added); *cf. American Federation of Labor v. Swing*, 312 U.S. 321, 325 (1941) ("Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye, it would be improper to dispose of the case otherwise than on the face of the decree.") (citations omitted). Speech will inevitably be chilled if vague and conclusory allegations of threats suffice to allow a complaint to survive a motion to dismiss. For this reason, the Constitution imposes more exacting standards at every stage of a lawsuit implicating protected activities.

To survive a motion to dismiss, a complaint that seeks to attach liability to speech must include allegations far more specific than would be necessary in the ordinary civil case. *See Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976) (holding that "in any case . . . where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required"), *cert. denied*, 430 U.S. 940 (1977); *accord, Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982). The content, manner, and setting of the offending speech must be pled with specificity in order to allow a court to determine whether the alleged speech is protected under the first amendment. Yet the

majority in *McCalden* never mentions, let alone applies, this heightened standard. In fact, the majority never acknowledges the potential for chilling the defendants' first amendment rights that is inherent in allowing litigation to go forward on the basis of vague complaints alleging tortious speech. The majority's routine treatment of the plaintiff's complaint -- as if the action involved nothing more than a dispute over a bill of lading -- is at odds with the last thirty years of first amendment jurisprudence and is reason enough to hear this case en banc.

Third, the majority has created an artificial and erroneous distinction between public and private speech. The majority does not go so far as to suggest that the intended demonstration itself would have been constitutionally unprotected. Nor does the majority find that, under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982), a public speech or press conference announcing the planned demonstration would be "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," 395 U.S. at 447, and therefore constitutionally unprotected. On the contrary, it appears from the majority opinion that my colleagues recognize that if defendants Rabbi Hier, the Simon Wiesanthal Center, and the American Jewish Committee had notified defendant CLA of their intentions by means of a public communication, the conduct would be protected and dismissal of the complaint would be required. However, the majority concludes that because the defendants[1] allegedly chose to communicate with the CLA in private their otherwise-protected speech is stripped of its constitutional safeguards. This puzzling, and erroneous, conclusion results from the majority's reasoning that "[p]rivately communicated threats have traditionally been punishable where they have 'a reasonable tendency to produce in the victim a fear that the threat will be carried out.'" Amended Majority Opinion at ___ (quoting *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983)). Yet the first

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[1] There are a number of defendants in this case, including the City of Los Angeles and the Westin Bonaventure Hotel. However, for purposes of this dissent, whenever the term "defendants" is used without further identification it refers to the defendants who are alleged to have engaged in the threatening conduct -- Rabbi Hier, the Simon Wiesenthal Center for Holocaust Studies, and the American Jewish Committee.

amendment exception discussed in Wurtz has no applicability whatsoever to the facts of *McCalden*.

It is true that private threats may give rise to criminal or civil liability. So may public threats. The significance of the public-private distinction is that under certain circumstances private threats are more likely to give rise to a reasonable fear that the threat will be carried out. In this case, however, the public-private distinction is without constitutional validity, as well as entirely irrelevant. The principal issue in this case is not whether the recipient of the threat, the California Library Association, had a reasonable fear that the threat would be carried out. The principal issue before us -- the principal issue on which the majority goes astray -- is whether the alleged threat, a threat to hold a public demonstration, is the type on which liability may be founded. Our primary concern must be with the content of that threat, not with whether it was made publicly or privately. If the content of the speech is protected, that is the end of our inquiry. *See generally Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 60 U.S.L.W. 4029, 4034-35 (U.S. Dec. 10, 1991) (Kennedy, J., concurring in the judgment).

Fourth, the first amendment limits the state's power to define words as "threats" and to impose civil liability for their utterance. Under the first amendment, a state may not punish as a threat words that announce an intention to engage in constitutionally protected conduct. In *Wurtz*, the court was considering a threat of rape. Rape, it goes without saying, is quintessential criminal conduct -- hardly a matter for constitutional protection -- and it is not surprising that liability may attach to speech used to instill a fear of such conduct. The "threat" in *McCalden* was to engage in first amendment activity; specifically, to hold a political demonstration. The threat to engage in political activities is protected by the Constitution. The Constitution not only protects the right to hold political demonstrations, it protects the right to tell others of an intention to hold one -- and it protects the right to tell them in private as well as in public. The exception the majority relies on -- an exception used primarily to allow prosecution for extortion -- is for speech that threatens unlawful conduct, speech that threatens the kind of conduct that takes place behind closed doors or in dark alleyways, speech that under the Constitution may be silenced. Such an exception has absolutely no applicability to the case of a threatened

political demonstration.

The threat to conduct a demonstration does not lose its constitutional protection because demonstrations generally, or this demonstration in particular, may be disruptive or likely to result in property damage, and the speaker communicates this fact to the public at large, or to the group at which the demonstration is aimed. Contrary to the *McCalden* majority's view, the lesson of *Brandenburg* and *Claiborne Hardware* is *not* that public speeches are somehow less threatening than private communications and so can be tolerated even when private communications cannot.[2] Whether the defendants informed the CLA of their intention to hold a demonstration by means of a public press conference or a private communication, the CLA would "get the message" just as the boycott violators in *Claiborne Hardware* would have gotten the message whether Charles Evers gave his warning through newspaper ads, at a press conference, or in mailings sent to all the members of local churches or the NAACP. The proper lesson of the Supreme Court cases is that, in the midst of a heated political debate, strong words warning of strong action are normal and healthy, and tolerance of them is necessary if a robust public discourse is to be maintained.

Throughout our history, we have experienced demonstrations that have been disorderly and caused damage. Some of our most important political demonstrations -- the Boston Tea Party, the Cooper Union labor rally, the Ford Motor Company strikes, the Berkeley free speech demonstrations, and the Vietnam War protests -- have been marked by disruptive tactics and even violence. Yet these demonstrations caused the public to confront the underlying

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[2] The majority seems to misunderstand the import of the *Claiborne Hardware* Court's holding that "Charles Evers could not be held liable for [his] public speech, but . . . individuals who 'engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused.'" Amended Opinion at ___ (quoting *Claiborne Hardware*, 458 U.S. at 926). The distinction is not, as the majority asserts, between public and private speech. Instead, it is between a "threat" to conduct a boycott which the Court holds constitutionally-protected even though the sponsor made it clear that violence might well play a part (see note 3), and more specific, individual acts or threats of direct violent conduct which the Court states are unprotected.

political issues and as a result, in many cases, turned the course of our nation's future. The recent unruly political protests directed against California's Governor Wilson in response to his veto of a gay rights bill are simply the latest reminder that political demonstrations are often not quiet, orderly, or anemic. We have come to regret those instances -- such as the Tompkins Square labor demonstration, the I.W.W.'s free speech protests in San Diego and Everett, Washington, the Bonus Expeditionary Force's march on Washington, and the anti-war protests at Kent State -- in which the fear of disorder was used to justify the suppression of free speech. The lesson of our history is that vituperative language and disruptive conduct are frequently normal elements of robust political controversy. We must be wary of direct attempts to suppress that form of political expression through the use of injunctions or criminal proceedings, and we must be equally wary of permitting indirect suppression of such expression by means of tort and other civil actions.

The Supreme Court has held that the first amendment protects speech far more violent and threatening tha[n] anything alleged by the plaintiff here.[3] The Court has reminded us that "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *Claiborne Hardware*, 458 U.S. at 928. The rules regarding demonstrations are not those of Emily Post, and conduct that would be inappropriate in a parlor is routinely tolerated as a part of a political protest. When a political controversy generates strong emotions and threatens to become unruly, there is

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[3] In *Claiborne Hardware*, the Supreme Court held that Charles Evers' speech was protected even though he "threatened" potential boycott violators by warning them that the sheriff would be unable to protect them from harm if they helped weaken the boycott by failing to live up to their agreement to participate:

> We intend to enforce [the boycott]. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. (That's right.) He ain't going to offer to sleep with none of us men, I can tell you that. (Applause) Let's don't break our little rules that you agreed upon here.

458 U.S. at 938-39. It is worth noting that, though Evers' speech "threatens" boycott violators with harm, the harm threatened is one of the readily foreseeable consequences of a bitter and violently-contested political boycott.

a better solution than silencing the demonstrators -- the government must keep the peace without stifling the debate. *See* Laurence H. Tribe, *American Constitutional Law* § 12-10, at 852 (2d ed. 1988).

To advise the target of a planned political demonstration that the event is likely to result in disruption and property damage is, in many instances, simply to state the obvious. Certain types of constitutionally protected demonstrations involving highly emotional, divisive or inflammatory issues are inevitably going to be less peaceful than might [be] desirable in an ideal society. Demonstrations by Holocaust survivors against Holocaust revisionists clearly fall in this category. Yet, such demonstrations are entitled to full constitutional protection. Certainly, the statement that a political demonstration will be held cannot subject the organizers to liability; nor can the fact that a truthful warning is given that, in view of the nature of its underlying dispute, disruption and property damage may well result.

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Viewed in the context of the bitter political controversy which underlies this lawsuit, and evaluated in the light of the four points I have just emphasized, it is apparent that the plaintiff's complaint fails to state a claim. My colleagues admit that even liberally construed, the complaint contains just a single allegation of a specific threat. *See* Amended Opinion at ___ ("Liberally construed, the complaint contains one allegation of a specific threat."). That allegation is that three defendants, Rabbi Hier, the Simon Wiesanthal Center, and the American Jewish Committee, informed defendant CLA that their "Annual Conference would be disrupted, there would be damage to property and the CLA would be 'wiped out.'" *See id.* This specific allegation is supplemented by a more general charge that the disruption and consequent damage would result from "a demonstration that [the three defendants] knew and intended 'would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA.'" *Id.* (quoting the Plaintiff's complaint). According to the majority, this was sufficient to establish a threat to the plaintiff because "it is reasonable to infer that any property damage or injury threatened could be directed against [the plaintiff], because the allegations clearly link the alleged threat to an intent to disrupt [the plaintiff's] exhibit and program." *Id.* In short, the majority's construction of the complaint is that it alleges that the three defendants told the

CLA that they intended to hold a political demonstration to protest the CLA's choice of conference participants, that this demonstration would cause disruption and property damage, and that some of this damage might be suffered by the plaintiff.

Even under this construction, the complaint does not allege any actions by the defendants that are not protected by the first amendment. When viewed in the context of the overall dispute, the threat to "wipe out" the defendant California Library Association is pure hyperbole and does not rise to the level necessary to sustain the plaintiff's cause of action. *See Cafeteria Employees Union, Local 302 v. Angelos*, 320 U.S. 293, 295 (1943) (holding that state may not hold a union liable for "loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies -- like 'unfair' or 'fascist'"). Similarly, the allegation that the defendants "knew and intended [to] create a reasonable probability . . . of violence" adds nothing. This allegation must be read in light of the more specific allegations that the three defendants threatened to "disrupt" the CLA's meeting and that this would cause a reasonable probability of "damage to property." As used in the complaint, "violence" is a conclusory term. It must be read as referring back to the specific charge that the defendants threatened and intended a disruptive demonstration with the attendant risk of property damage. The term itself adds nothing to those specific charges. There are no allegations of threats of personal violence directed at particular individuals and there is nothing in the complaint to suggest that what was threatened was anything more than what I have previously described as the normal incidents of a highly emotional and volatile political protest. And while such a threat, as explained earlier, may justify the deployment of sufficient law enforcement personnel to maintain the peace, it may not serve as the basis for a complaint for damages. Political demonstrations may not be banned because they are likely to be disruptive or result in property damage; and, even more so, a threat to hold such a demonstration cannot justify the imposition of civil or criminal liability. The interests of society are sufficiently preserved by adequate policing and the punishment of any unprotected conduct that actually occurs.

Moreover, the plaintiff's complaint is far too vague to survive a motion to dismiss. Even the majority's "one allegation of a specific threat" fails to meet the heightened standard of specificity required

by *Franchise Realty*. Although federal appellate courts have had few occasions on which to develop that standard, the California courts have established detailed pleading requirements for complaints alleging tortious speech. Under California law, when a plaintiff seeks damages for another's words, those words "must be specifically identified, if not pleaded verbatim, in the complaint." *Kahn v. Bower*, 284 Cal.Rptr. 244, 252 n.5 (Cal.App. 1991); 5 B. Witkin, California Procedure § 688, at 140 (3d ed. 1985).[4] When the words are ambiguous, what matters is how the recipient of the threat, here the CLA, understood them, and extrinsic circumstances must be pleaded to demonstrate that the words are "fairly susceptible" to an unprotected interpretation and that they were so understood by the recipient. *See* 5 B. Witkin, Summary of California Law § 493, at 580-81 (9th ed. 1988).

The specific allegation at issue in *McCalden* is that the three defendants "contacted a representative of Defendant CLA and informed him that if [its agreements with the plaintiff] were not cancelled, Defendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be 'wiped out.'" This allegation gives little indication of the actual words alleged to constitute a threat, the manner in which the words were communicated, or *the setting in which the communication took place*. It does not even state whether the words were oral or written (although in this case we may reasonably assume the former). Yet, the merits of a claim based on speech may depend upon the phrasing, manner, and context of the alleged communication. *See, e.g., Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 285-87 (1974) (holding that, when used in the context of a labor dispute, the epithet "scab" may not serve as the basis for a cause of action under state libel law); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-15 (1970) (same for the use of the

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[4] Although this pleading requirement applies specifically to defamation claims, it is applicable to all claims implicating first amendment activity. As the Supreme Court made clear in *Sullivan*, the limitations of the first amendment are applicable whenever the effect of the litigation is the repression of expression; a cause of acton under the Unruh Civil Rights Act -- like any other cause of action -- "can claim no talismanic immunity from constitutional limitations." 376 U.S. at 269; *see also, Blatty v. New York Times Co.*, 232 Cal.Rptr. 542, 549 (Cal. 1986).

term "blackmail" to characterize the negotiating position of one side in a heated political debate). Because the complaint fails to specify these matters, a court could not determine that it states a claim upon which relief may be based, even aside from all its other infirmities. Nor does the plaintiff's allegation that the three defendants "contacted a representative of Defendant CLA and informed him" of the intended demonstration suggest that the setting was in any way threatening -- let alone specify that the "threat" was made in private. Under the pleading requirements applicable in first amendment cases, there is simply no basis for the majority's conclusion that the plaintiff has pled "privately communicated threats of violence" that have "'a reasonable tendency to produce in the victim a fear that the threat will be carried out.'" Amended Opinion at ___ (quoting *Wurtz v. Risley*, 719 F.2d 1348, 1441 (9th Cir. 1983)).

In summary, there are many errors in the majority's opinion in *McCalden*, a number of which would warrant hearing the case en banc. The majority fails to apply the appropriate pleading requirements for complaints seeking to penalize speech. It fails to consider the context of political controversy in which the alleged words were spoken and as a result erroneously extends an exception to the first amendment for criminal threats to speech announcing a political demonstration. It fails to recognize the practical realities of our constitutional commitment to free expression -- that angry rhetoric and the venting of strong emotions are often accompanied by a degree of disruption and even property damage, and that it is far better to tolerate the possibility of such demonstrations than to discourage or prohibit political protest. Nor does the majority appear to recognize that the threat of a demonstration is even further removed from unprotected activity than the act itself -- because the threat of political protest is speech in its purest form. The result of these errors is to subject those engaged in political debate to the possibility of prolonged and expensive court battles and to allow litigants to use the courts to silence political speech rather than protect it. When the defendants threatened to conduct a political demonstration, and thereby purportedly convinced the California Library Association to reject the Holocaust revisionists' participation in its conference, they were simply announcing their intent to exercise their first amendment rights. Allowing McCalden to invoke the power of the courts in order to seek monetary damages does violence to the first amendment protection for free speech. I very

much regret our decision not to hear this case en banc.

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Any discussion of the free speech issue in the present case would be incomplete if it failed to take note of the fundamental irony in the parties' respective positions. Here, defendants, the victims of religious persecution and intolerance, sought to shut off the speech of those who would deny the reality of their suffering.[5] In my opinion, this demonstrated exceedingly poor judgment on defendants' part, as well as a myopic view of our democratic system. The episode at Skokie should have taught us all that in the long run it does not pay to try to silence speech we find odious, if only because the result frequently is far more publicity for the point of view we are seeking to suppress.

There are of course more fundamental reasons why we should not stifle offensive speech. "Free speech is life itself." Salman Rushdie (quoted in N.Y. Times, December 12, 1991, at A1); *see also, Sullivan*, 376 U.S. at 725 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'") (quoting John S. Mill, On Liberty 15 (Oxford 1947) (1859)); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing the "marketplace of ideas"). The wisdom of Mill, Holmes, Brennan, and Rushdie should be sufficient to motivate all of us to tolerate speech gladly, even when it appears to be harmful. Simply because we have the constitutional right to attempt to cause businesses, organizations, or institutions to limit speech, to cancel scheduled programs, to withdraw art, to refuse to show motion pictures is no justification for doing so. Democracy suffers when that form of private censorship occurs. Almost everything in our society is offensive to some individual or group. If we permit the silencing of whatever is distasteful to some, our life in this nation will be far less rich and full. New ideas are frequently disturbing -- at least

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[5] Because defendants prevailed below at the pleading stage, we do not know whether they actually uttered the threats they are alleged to have made. There is little doubt, however, that they sought to persuade the CLA that it should not permit the Holocaust revisionists' materials and program to be presented at the annual conference.

until we become used to them. They are not likely to flourish if we chop them off at the inception, simply because some persons or group is offended. The right or wrong of speech is simply irrelievant to the question whether it should be heard. We must have emough confidence in democracy to believe that truth will prevail, or we will soon find ourselves without ideas at all. I would hope that these fundamental principles would guide the defendants', indeed all of our, actions in the future. Nevertheless, unwise as the actions of Rabbi Hier, the Simon Wiesanthal Center, and the American Jewish Committee may have been, because their actions were conducted by protected means, they had a right, under our Constitution, to engage in them -- and they must neither be punished nor sanctioned for doing so.

NOONAN, Circuit Judge, dissenting from the order rejecting the suggestion for rehearing en banc:

While I am in general agreement with the dissents of Judge Reinhardt and Judge Kozinski, it does not seem to me necessary to go beyond the construction of the complaint read in the light off the First Amendment. *Coon v. Joseph*, 192 Cal. App. 3rd 1269, 237 Cal. Rptr. 873 (1987) holds that a threat against another person cannot be construed as a threat against the complainant. No more is alleged here. As the dissents of Judge Reinhardt and Judge Kozinski make clear, an indulgent standard of pleading is inappropriate where the plaintiff is seeking damages for the speech of the defendant. I believe the case should have been taken en banc and dissent from the failure to do so.

APPENDIX G

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California corporation, et al., *Defendants*.

No. CV86-4755 CBM

United States District Court, Central District of California

February 10, 1988, Filed

NOTICE OF APPEAL

Notice is hereby given that DAVID MC CALDEN, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Memorandum Opinion Granting Moving Defendants' Motion to Dismiss entered February 11, 1987; the [Order] Granting Moving Defendants' Motion to Dismiss entered March 24, 1987; and the Order Denying Plaintiff's Motion for Entry of Judgment entered July 30, 1987.

The names of the parties to the orders appealed from are David McCalden, California Library Association, City of Los Angeles, American Jewish Committee, Marvin Hier, Westin Hotel Co. d/b/a Westin Bonaventure Hotel, and Simon Wiesenthal Center, Inc.

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DATED: February 4, 1988

(signed)
Bruce B. McKee, Attorney
for David McCalden

APPENDIX H

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California Corporation, CITY OF LOS ANGELES, AMERICAN JEWISH COMMITTEE, a New York corporation, MARVIN HIER, an individual, WESTIN HOTEL CO. OF UAL, INC., a corporation d/b/a WESTIN BONAVENTURE HOTEL, and SIMON WIESENTHAL CENTER, Inc., a California corporation, *Defendants*.

No. CV86-4755 CBM (KX)

United States District Court, Central District of California

February 9, 1987, Filed

SECOND AMENDED COMPLAINT FOR BREACH OF CONTRACT; FOR INTENTIONAL INTERFERENCE WITH CONTRACT; FOR VIOLATION OF CONSTITUTION; FOR DEPRIVATION OF CIVIL RIGHTS; FOR CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS; FOR NEGLECT TO PREVENT CONSPIRACY; FOR VIOLATION OF UNRUH CIVIL RIGHTS ACT; AND FOR INJUNCTION.

Plaintiff alleges:

JURISDICTION AND PARTIES

1. This action is brought pursuant to 42 U.S.C. Section 1981, 1983, 1985, 1986 and 1988, and the First, Fifth, and Fourteenth Amendments. Jurisdiction is founded on 28 U.S.C. Sections 1331, 1332 and 1343 (1) (2) (3) (4), and the aforementioned statutory and Constitutional provisions. Plaintiff further invokes the pendant jurisdiction of this Court to consider claims arising under State law.

2. The amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000).

3. Plaintiff, DAVID McCALDEN, is and was at all times relevant hereto a citizen of the United Kingdom and a legal permanent resident of the United States. As to all matters alleged herein, plaintiff was doing business under the name "Truth

Missions".

4. Plaintiff is informed and believes and thereon alleges that Defendant CALIFORNIA LIBRARY ASSOCIATION is and was at all times relevant hereto a corporation organized and existing under the laws of the State of California.

5. Plaintiff is informed and believes and thereon alleges that Defendant AMERICAN JEWISH COMMITTEE is and was at all times relevant hereto a corporation organized under the laws of the State of New York.

6. Plaintiff is informed and believes and thereon alleges that Defendant CITY OF LOS ANGELES is and was at all times relevant hereto a municipal corporation, organized and existing under the laws of the State of California.

7. Defendant CITY OF LOS ANGELES has ratified all of the acts and omission herein below recited.

8. Plaintiff is informed and believes and thereon alleges that Defendant MARVIN HIER is an individual resident in the County of Los Angeles, California, and is affiliated with and employed by Defendant SIMON WIESENTHAL CENTER, INC., as dean, i.e. executive director.

9. Plaintiff is informed and believes and thereon alleges that Defendant WESTIN HOTEL CO. OF UAL, INC. ("WESTIN") is and was at all times relevant hereto a corporation doing business in California as Westin Bonaventure Hotel.

10. Plaintiff is informed and believes and thereon alleges that Defendant SIMON WIESENTHAL CENTER, INC. a/k/a Simon Wiesenthal Center for Holocaust Studies a/k/a/ Simon Wiesenthal Center is a corporation organized under the laws of the State of California and is the successor in interest, owner, principal and responsible entity for predecessor organizations of the same name, some or all of which participated in the transactions and activities herein alleged.

COMPLIANCE WITH CALIFORNIA GOVERNMENTAL TORT CLAIMS ACT

11. With respect to the acts and omissions herein alleged, on May 25, 1985, Plaintiff filed, pursuant to California Government

Code Section 911.4, an Application for Permission to File a Late Claim and a claim form with Defendant, CITY OF LOS ANGELES.

12. On August, 16, 1985, Plaintiff was notified by Defendant CITY OF LOS ANGELES that his claim was denied.

FIRST CAUSE OF ACTION
(Breach of Contract)

13. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 12 of this Complaint.

14. On or about July 19, 1984, Plaintiff entered into a written contract with Defendant CALIFORNIA LIBRARY ASSOCIATION (hereinafter "CLA") for the rental of exhibit space at the CLA's 86th Annual Conference scheduled for December 1 through 5, 1984, at the Westin Bonaventure Hotel in Los Angeles. Copies of the documents constituting said contract are attached hereto as Exhibit A and incorporated herein by reference. Said contract shall hereinafter be referred to as "Contract A." The description of Plaintiff's proposed exhibit, as set forth in Contract A, is "Publishers of revisionist, libertarian and atheist research. Specializing in the defense of civil liberties for unpopular causes."

15. On or about August 17, 1984, Plaintiff entered into an additional written contract with Defendant CLA for the presentation of a program at the above-mentioned Annual Conference. Said program was scheduled for the evening of December 2, 1984. Copies of the documents constituting said contract are attached hereto as Exhibit B and incorporated herein by reference. Said contract shall hereinafter be referred to as "Contract B." The description of the proposed program, as set forth in Contract B, is "Free Speech and the Holocaust" -- "An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject." The contract indicated that 8 speakers would participate in the program, including Plaintiff; Bradley Smith, Director, Sacred Cow Press; Dr. Peter H. Peel, Santa Monica Community College; Dr. George Ashley, Polytechnic High School; and Jefferson P. Selth, Librarian, University of California, Riverside.

16. On or about November 16 or 17, 1984, Defendant CLA, acting unfairly and in bad faith, breached Contract A and Contract

B by cancelling Plaintiff's previously approved exhibit and program. In its notice of cancellation, a copy of which is attached hereto as Exhibit C, the CLA indicated that it "had received threats of substantial disruption to the conference and to the property of other exhibitors should your [Plaintiff's] program be allowed to be presented." However, the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support, including financial support, as a result of action taken by defendant CITY OF LOS ANGELES on or about November 16, 1984, in the form of a resolution of the Los Angeles City Council, a copy of which is attached hereto as Exhibit D and incorporated herein by reference.

17. Defendant CLA's breach of Contract A and B was intentional and without justification or excuse.

18. Plaintiff had performed all parts of Contract A and of Contract B which he was required to perform.

19. In both Contract A and Contract B there was present a public interest consideration of constitutionally protected rights.

20. As a result of Defendant CLA's breach of Contract A and Contract B, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, in a sum not less than $10,000.

WHEREFORE, Plaintiff prays for relief as set forth below.

SECOND CAUSE OF ACTION
(Interference with Contract)

21. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15 of this Complaint.

22. After Plaintiff had entered into Contract A and Contract B with Defendant CLA, and prior to December 1, 1984, Defendant AMERICAN JEWISH COMMITTEE ("AJC") requested a meeting with representatives of Defendant CLA with the purpose and intent of pressuring Defendant CLA to cancel its contract with Plaintiff. Representatives of Defendant CLA agreed to attend and did attend such a meeting prior to December 1, 1984, at Defendant AJC's offices in Los Angeles.

23. As a direct and proximate result of persuasion, threats, misrepresentations and other tortious conduct of Defendant AJC at said meeting, Defendant CLA determined to and did cancel its contracts with Plaintiff.

24. Plaintiff is informed and believes and on that basis alleges that after Plaintiff had entered in Contract A and Contract B with Defendant CLA, and prior to December 1, 1984, representatives of Defendant AJC, at the urging and request and with the knowledge, approval and cooperation of Defendant MARVIN HIER ("HIER") and SIMON WIESENTHAL CENTER, INC. ("WIESENTHAL"), contacted a representative of Defendant CLA and informed him that if the aforesaid Contract A and Contract B were not cancelled, Defendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be "wiped out." The aforesaid conduct of Defendant AJC, as set forth in this paragraph and in paragraphs 22 and 23, was intentional, malicious, fraudulent and in conscious disregard of the contractual and constitutional rights of Plaintiff.

25. As a direct and proximate result of such threats, Defendant CLA determined to and did cancel its contracts with Plaintiff.

26. After Plaintiff had entered into Contract A and Contract B with Defendant CLA, and prior to December 1, 1984, Defendant CITY OF LOS ANGELES acting through its City Council, officially requested that Defendant CLA remove Plaintiff from its programs, and officially severed City participation in Defendant CLA in protest of the CLA's having contracted with Plaintiff, and for the purpose of creating a threat of political and economic sanctions that would force Defendant CLA to cancel its contracts with Plaintiff. Such action was taken by Defendant CITY OF LOS ANGELES, by unanimous Resolution of its City Council, based upon representations of Councilman Yaroslavsky. Said representations misidentified Plaintiff, misrepresented Plaintiff's position and stated purpose of his program, and was motivated solely by fear and hatred of Plaintiff's views concerning the Holocaust. A copy of a transcript of City Council proceedings concerning plaintiff is attached hereto as Exhibit E and incorporated herein by reference. Said transcript was prepared from an official audio tape of Council Proceedings.

27. Plaintiff is informed and believes and on that basis alleges

that the aforesaid Resolution was introduced by Councilman Yaroslavsky at the specific instance and request of one of his constituents, Defendant HIER, and that Defendant HIER misrepresented to Councilman Yaroslavsky the nature and purpose of Plaintiff's intended program at the CLA annual conference, the identity of Plaintiff, the affiliations of Plaintiff, and the identities, affiliations and beliefs of persons scheduled to appear with Plaintiff at said annual conference. Plaintiff is informed and believes and on that basis alleges that said conduct of Defendant HIER was in an individual capacity and/or as dean of Defendant WIESENTHAL, and that said conduct was undertaken at the request and urging, and with the knowledge, approval, and cooperation of Defendants WIESENTHAL and AJC, of Los Angeles Mayor Tom Bradley and others.

28. Said Council Resolution and other matters of a condemnatory nature were communicated by Defendant CITY OF LOS ANGELES to Defendant CLA, prior to December 1, 1984, with the result that Defendant CLA determined to and did cancel its contracts with Plaintiff. The aforesaid conduct of Defendants CITY OF LOS ANGELES, HIER, WIESENTHAL AND AJC was intentional, malicious, fraudulent, and in conscious disregard of the contractual and constitutional rights of Plaintiff.

29. Plaintiff is informed and believes and on that basis alleges that after Plaintiff had entered into Contract A and Contract B with Defendant CLA, and prior to December 1, 1984, Defendant WIESENTHAL, at the direction of defendant HIER, and at the request and urging and with the knowledge, approval and cooperation of Defendant AJC rented a conference room from Defendant WESTIN at the Westin Bonaventure Hotel for the evening of December 2, 1985, i.e., the evening on which Plaintiff's program "Free Speech and the Holocaust" was scheduled to take place. Said conference room was immediately adjacent to the room in which Plaintiff's program was scheduled to take place, and was within the area of the hotel which had previously been "block booked" to Defendant CLA for its 1984 annual conference.

30. Plaintiff is informed and believes and thereon alleges that the principal, if not sole purpose of Defendant WIESENTHAL's renting said conference room was to position itself and Defendants HIER and AJC so as to be able to disrupt Plaintiff's program should it take place. The aforesaid conduct of Defendant WIESENTHAL was intentional, malicious, fraudulent and in conscious disregard of

the contractual and constitutional rights of Plaintiff.

31. Plaintiff is informed and believes and thereon alleges that Defendant WESTIN knew or should have known at the time it entered into said rental agreement with Defendant WIESENTHAL that to do so constituted a breach of its agreement with Defendant CLA to provide adequate security, including limited public access, to the CLA conference area. Plaintiff is informed and believes and thereon alleges that Defendant CLA had conferred with Defendant WESTIN on several occasions and at length concerning security arrangements for said annual conference and that Defendant WESTIN, its agents and employees, were fully apprised that one of the principal security concerns of Defendant CLA was to maintain order at Plaintiff's program on the evening of December 2, 1984. The aforesaid conduct of Defendant WESTIN was intentional, malicious and in conscious disregard of Plaintiff's contractual rights, including rights as beneficiary of any contract between Defendants CLA and WESTIN, and was a proximate cause of Defendant CLA's breach of its contracts with Plaintiff.

32. Plaintiff is informed and believes and on that basis alleges that after Plaintiff had entered into Contract A and Contract B, and prior to December 1, 1984, defendant HIER, acting individually and/or as dean of Defendant WIESENTHAL, and at the request and urging and with knowledge, approval and cooperation of Defendants WIESENTHAL and AJC, and others, pressured Defendant CLA to cancel its contracts with Plaintiff by threatening and organizing a demonstration which he knew and intended would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA; and by then offering to remove said threat if Defendant CLA cancelled Contract B and publicly dissociated itself from Plaintiff.

33. Plaintiff is informed and believes and thereon alleges that the principal, if not sole purpose of Defendant HIER's action was to induce Defendant CLA by threats of violence and disruption to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to members of Defendant CLA, and further that as a direct and proximate result of such conduct Defendant CLA determined to and did cancel its contracts with Plaintiff.

34. Plaintiff is informed and believes and on that basis alleges that Defendants HIER and/or WIESENTHAL and/or AJC intentionally allowed information concerning Plaintiff's exhibits and

program to pass to members of certain militant, violence prone Jewish organizations who thereupon made plans to attend and disrupt Plaintiff's program and to disrupt Defendant CLA's conference through demonstrations organized by Defendant HIER. Information concerning plans of such organizations was given to Defendant CLA by representatives of the Los Angeles Police Department.

35. Plaintiff is informed and believes and on that basis alleges that the principal, if not sole purpose of Defendant HIER's and/or WIESENTHAL's and/or AJC's action was to induce Defendant CLA by further threats of violence and disruption to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to members of Defendant CLA, and further that as a direct and proximate result of such conduct Defendant CLA determined to and did cancel its contracts with Plaintiff.

36. Plaintiff is informed and believes and on that basis alleges that Defendants HIER and/or WIESENTHAL and/or AJC sought and obtained the cooperation of public officials, including without limitation, Mayor Tom Bradley, Assembly Speaker Willie Brown, State Senate President Davis Roberti, and Assembly Majority Floor Leader Mike Roos, as part of a conspiracy to pressure Defendant CLA to cancel its contracts with Plaintiff; and that in furtherance of such conspiracy each of said public officials contacted Defendant CLA, either verbally or in writing, for the sole and express purpose of inducing Defendant CLA to cancel said contracts and to prevent Plaintiff from expressing his views to CLA members. And further with respect to such conspiracy, Mayor Tom Bradley instructed members of the Los Angeles Library Commission to boycott Defendant CLA's Annual Conference, as an additional means of pressuring Defendant CLA to cancel its contracts with Plaintiff.

37. Plaintiff is informed and believes and on that basis alleges that the sole purpose of Defendant HIER's and/or WIESENTHAL's and/or AJC's action was to induce Defendant CLA by application of political pressure and threats of political sanctions to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to CLA members, and further, that as a direct and proximate result of such conduct Defendant CLA determined to and did cancel its contracts with Plaintiff.

38. Plaintiff is informed and believes and on that basis alleges

that the conduct of Defendants HIER, WIESENTHAL, AJC, WESTIN and CITY OF LOS ANGELES, as alleged in paragraphs 24 through 37, was part of a deliberate and concerted effort to organize and effect a campaign of escalating high pressure tactics, involving threats of violence and disruption and of political and economic sanctions, solely for the purpose of forcing Defendant CLA to cancel its contracts with Plaintiff and to prevent Plaintiff from associating with or expressing his views to CLA members.

39. Plaintiff is informed and believes and on that basis alleges that Defendant CITY OF LOS ANGELES, through its Mayor, Police Department, City Council and others, knew and either tacitly approved or failed to prevent or deter the conduct of Defendants WIESENTHAL and/or HIER and/or AJC alleged in paragraphs 22 through 24, and 27 through 38 of this Complaint.

40. As a direct and proximate result of conduct of Defendants AJC, CITY OF LOS ANGELES, HIER, WESTIN and WIESENTHAL, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, in a sum not less than $10,000.

WHEREFORE, Plaintiff prays for relief as set forth below.

THIRD CAUSE OF ACTION
(Violation of U.S. Constitution)

41. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15 and 26 through 28 of this Complaint.

42. The above-mentioned Resolution of the City Council of the City of Los Angeles, passed on November 16, 1984 (Exhibit D), is in violation of the United States Constitution in that it was intended to and did, through public condemnation and pressure of Defendant CLA, interfere impermissibly with Plaintiff's rights of free speech and assembly and his right to due process of law.

43. Plaintiff is informed and believes and thereon alleges that the only rationale for such official action of Defendant CITY OF LOS ANGELES was that Plaintiff's views are generally thought to be repugnant, hateful and untruthful. Plaintiff was not given notice that his views and his contracts with Defendant CLA were to be on the City Council's agenda, nor was Plaintiff present at said Council

meeting, nor was Plaintiff given any opportunity to defend himself or to explain that his program at said CLA convention was to concern "Free speech and the Holocaust." Moreover, said Council made no effort to verify the allegations against Plaintiff which it felt would justify its official actions. See Exhibit E attached hereto and incorporated herein by reference.

44. As a direct and proximate result of unconstitutional action of Defendant CITY OF LOS ANGELES, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, in a sum not less than $10,000.

WHEREFORE, Plaintiff prays for relief as set forth below.

FOURTH CAUSE OF ACTION
(For Deprivation of Rights)

45. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15, and 26 through 39, and 42 and 43 of this Complaint.

46. In addition to depriving Plaintiff of fundamental rights, privileges and immunities by official action, as herein alleged, Defendant CITY OF LOS ANGELES, through intentional inaction, further deprived Plaintiff of such rights, privileges and immunities. Both the action and inaction of Defendant CITY OF LOS ANGELES, and the action of Defendants HIER, WIESENTHAL and AJC more particularly described in paragraphs 26 through 36, and 39 and 40, and in the following paragraphs, are the subject of this cause of action.

47. Plaintiff is informed and believes and thereon alleges that prior to December 1, 1984, agents and employees of Defendant CITY OF LOS ANGELES, and particularly of its Police Department, acting under color of law, approached the Director of Defendant CLA and informed him that they had received death threats directed against him if he allowed the CLA to honor its contract with Plaintiff and allowed Plaintiff to speak at the CLA's annual convention He was further informed that these threats were "real." Said agents and employees further informed the Director of Defendant CLA that there would be violent demonstrations against

him and against the CLA if he allowed the CLA to honor its contract with Plaintiff and allowed Plaintiff to speak at the CLA's annual convention. Said agents and employees further informed Defendant CLA that the Police Department of Defendant CITY OF LOS ANGELES would henceforth be unable to provide adequate police protection or security measures for the CLA's annual convention, for the CLA itself, for the Director of the CLA, and for Plaintiff.

48. The above-mentioned actions of Defendants CITY OF LOS ANGELES, HIER, WIESENTHAL and AJC were unreasonable and unjustified and were motivated by a desire and intent to deprive Plaintiff of rights, privileges and immunities secured to him by the Constitution and laws of the United States. Said actions did, in fact, subject or cause Plaintiff to be subjected to the deprivation of rights, privileges and immunities secured to him by the Constitution and laws of the United States.

49. In committing the acts alleged above, Defendants HIER, WIESENTHAL, AJC and CITY OF LOS ANGELES acted deliberately and intentionally, under color of law, custom and usage, with malice, and with the intent to harm, intimidate and injure Plaintiff.

50. Plaintiff is informed and believes, and thereon alleges, that Defendant CITY OF LOS ANGELES has ratified the above mentioned acts committed by its agents and employees by continuing to employ said persons and by failing to take any measures to discipline, reprimand, punish, or deter said persons from further such conduct.

51. As a direct and proximate result of such conduct of Defendants CITY OF LOS ANGELES, HIER, WIESENTHAL and AJC Plaintiff has suffered damages including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, in a sum not less than $10,000.

WHEREFORE, Plaintiff prays for relief as set forth below.

FIFTH CAUSE OF ACTION
(Conspiracy to Interfere with Civil Rights)

52. Plaintiff incorporates by this reference the allegations of

paragraphs 1 through 15, 26 through 39, 42, 43, and 46 through 50 of this Complaint.

53. The above-described conduct of Defendants AJC, CITY OF LOS ANGELES, HIER, WESTIN and WIESENTHAL, and each of them, was undertaken in furtherance of a conspiracy or conspiracies to deprive Plaintiff, directly and indirectly, of the equal protection of the laws and of equal privileges and immunities under the laws, and for the purpose of preventing and hindering the constituted authorities of this state from giving an securing to all persons within this state the equal protection of the laws. Said defendants and others joined in such conspiracy or conspiracies as part of a wide ranging and concerted effort to deprive Plaintiff of his constitutional rights, privileges and immunities. Said defendants and others engaged in an escalating series of threats and inducements intended to force Defendant CLA to cancel its contracts with Plaintiff. Conduct undertaken in furtherance of such conspiracy or conspiracies includes without limitation: obtaining a resolution of the Los Angeles City Council condemning Plaintiff without notice or hearing and threatening severe economic and political sanctions against Defendant CLA if it allowed Plaintiff to express his views at its Annual Conference; threatening and organizing protests which were calculated to create a threat of property damage and violence against Plaintiff and CLA members; renting a conference room adjacent to Plaintiff's in order to gain access to and disrupt Plaintiff's program and prevent Plaintiff from expressing his views; withdrawing Los Angeles Police security from Defendant CLA's Annual Conference; and inducing public figures such as Assembly Speaker Willie Brown and Los Angeles Mayor Tom Bradley to exert political pressure against Defendant CLA to prevent Plaintiff from expressing his views.

54. Said conspiracy or conspiracies were directed against Plaintiff not as an individual but solely because of his membership in a class know as Holocaust revisionists. The members of said class, number several thousand in North America and Europe, engage in research, writing, publication and discussion. Their aims and activities in the United States are lawful. Their position with regard to the Holocaust is, in general, that available facts and scientific analysis do not support the popular perception of the Holocaust as a planned extermination of Jews and other persons by the Nazis.

55. The views of Holocaust revisionists are extremely unpopular in most of Europe and North America. Because of their views, Holocaust revisionists themselves have been subject to invidious discrimination, not only with respect to their efforts to express their views but also in their jobs, businesses, schools and homes. Incidents of such discrimination include, without limitation, summary termination of employment for holding or expressing revisionist views; physical attacks against known revisionists; firebombings of the home of a revisionist and the offices of a revisionist publisher; obscene phone calls; threats, intimidation and harassment of revisionists. All of such discrimination is class based and is intended to suppress the free exercise of legal rights in the same circumstances, i.e., circumstances similar to those of victims of Ku Klux Klan violence, which led to the passage of our nation's first civil rights laws, and specifically of 42 U.S.C. §1985(3).

56. Plaintiff and other Holocaust revisionists are deserving of the protection of 42 U.S.C. §1985(3) because local governmental agencies, including law enforcement authorities, have participated in conspiracies to deprive such persons of their rights and/or have refused to protect such persons in the free exercise of their rights. In this action, for example, the conduct of Defendant CITY OF LOS ANGELES was motivated by hatred and fear of the views of Plaintiff and other Holocaust revisionists, as more specifically set forth in the transcript of City Council proceedings attached hereto as Exhibit E.

57. As a direct and proximate result of said conspiracy or conspiracies, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, and has been deprived of having and exercising the rights and privileges of a legal permanent resident of the United States.

WHEREFORE, Plaintiff prays for relief as set forth below.

SIXTH CAUSE OF ACTION
(Neglect to Prevent Conspiracy)

58. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15, 26 through 39, 42, 43, 46 through 50, and 53 through 57 of this Complaint.

59. Defendants AJC, CITY OF LOS ANGELES, HIER, WESTIN, and WIESENTHAL, and each of them, knew or should have known that the necessary object and intended effect of the wrongful conduct, conspiracies, and concerted action described herein was to deprive Plaintiff of legal rights, privileges, and immunities and of the equal protection of the laws.

60. Defendants AJC, CITY OF LOS ANGELES, HIER, WESTIN and WIESENTHAL, and each of them, had the power to prevent or aid in preventing the commission of said wrongs, but nevertheless neglected and refused to do so. Each of said Defendants, by reasonable diligence, could have prevented the occurrence of all or some of the wrongs suffered by Plaintiff as a result of illegal conspiracies alleged herein.

61. As a direct and proximate result of said neglect and refusal to prevent acts in furtherance of conspiracies herein alleged, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, and has been deprived of having and exercising the rights and privileges of a legal permanent resident of the United States.

WHEREFORE, Plaintiff prays for relief as set forth below.

SEVENTH CAUSE OF ACTION
(Violation of Unruh Civil Rights Act)

62. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15, 24, 29 through 39, 46 through 50, and 53 through 55 of this Complaint.

63. The above-described threats of violence and intimidation by threats of violence committed against Plaintiff's person and property by Defendants AJC, WESTIN, HIER and WIESENTHAL, and each of them, were undertaken because of Plaintiff's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, in violation of Section 51.7 of the California Civil Code.

64. Defendants AJC, WESTIN, HIER and WIESENTHAL, and each of them, and their agents, members, and employees, aided, incited and conspired to deny to Plaintiff his right to be free from such threats and intimidation, by means of the conduct herein

alleged and other conduct not presently known to Plaintiff.

65. As a direct and proximate result of conduct of Defendants AJC, WESTIN, HIER and WIESENTHAL, and each of them, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, loss of publicity and recognition in the practice of his profession.

WHEREFORE, Plaintiff prays for relief as set forth below.

EIGHTH CAUSE OF ACTION
(For Injunction)

66. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15, 26 through 39, 42, 43, 46 through 50, 53 through 56, and 59 through 61 of this Complaint.

67. The above-mentioned conduct of Defendant CITY OF LOS ANGELES is tortious, unconstitutional and constitutes a deprivation of Plaintiff's civil rights, a conspiracy to deprive Plaintiff of his civil rights, and neglect and refusal to prevent such conspiracy.

68. Unless Defendant CITY OF LOS ANGELES is enjoined from further such conduct, Plaintiff will remain subject to condemnation by said Defendant without noitice or hearing and to threats and pressure by said Defendent against Plaintiff and persons with whom he associates or wishes to associate. Such conduct by Defendant CITY OF LOS ANGELES will lead to irreparable injury to Plaintiff's reputation and ability to earn a living. Moreover, such conduct, if not enjoined, may endanger Plaintiff's personal safety since it gives to third persons the impression that Plaintiff will not be protected by civil authorities.

WHEREFORE, Plaintiff prays for relief as follows:

1. For general damages according to proof at trial;

2. For punitive damages;

3. For costs of suit;

4. For a reasonable attorney's fee;

5. For injunctive relief against Defendant CITY OF LOS ANGELES prohibiting it from taking official action against Plaintiff or those associated with Plaintiff without notice of intended action and opportunity for Plaintiff to be heard; and

6. For such additional relief as the court deems appropriate in the circumstances.

DATED: August 28, 1986

(signed)
BRUCE B. McKEE

(2)

No. 91-1699

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1991

VIVIANA McCALDEN, AS ADMINISTRATOR OF THE ESTATE OF DAVID McCALDEN,
Petitioner,

v.

THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES, RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE AND THE CITY OF LOS ANGELES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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May 11, 1992

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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STATEMENT OF THE CASE

Petitioner McCalden seeks plenary review so that he can urge this Court to expand the scope of 42 U.S.C. §1985(3) so as to provide a cause of action to any individual, such as himself, who claims to be the victim of political or ideological opposition directed against a supposed "class" defined as people who share his ideas. Thus, McCalden would ask the Court effectively to eliminate from §1985(3) the historical requirement that the plaintiff be a victim of class-based animus. McCalden's request is unworthy of this Court's time and attention.

This is the second petition for writ of certiorari presented to this Court in connection with the decision below. This petition, filed by plaintiff McCalden, seeks review of the Ninth Circuit's judgment dismissing McCalden's claims under 42 U.S.C. §§ 1985(3) and 1986. The petition in No. 91-1643, filed by the parties who are respondents here, seeks review of the First Amendment issues raised by the Ninth Circuit's judgment reinstating McCalden's other claims and remanding for trial on those claims.

Petitioner McCalden is a self-proclaimed "Holocaust revisionist" who proselytizes the view that the historical record of Nazis murdering millions of Jews and other civilians is a hoax. Complaint ¶ 54 (A72).[1] When the California Library Association ("CLA") canceled an exhibit that McCalden had planned to present at the CLA's 1984 annual convention, McCalden sued the CLA for breach of contract in a U.S. District Court. He also brought suit against the respondents — the Simon Wiesenthal Center for Holocaust Studies ("Center"), the Center's Dean, Rabbi Marvin Hier, the American Jewish Committee ("AJC"), and the City of Los Angeles — alleging that they conspired to induce the CLA to cancel McCalden's exhibit contract "by threatening and organizing a demonstration which [they] knew and intended would create a

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[1] Since the case was appealed from the District Court's dismissal under Fed.R.Civ.P. 12(b)(6), the facts set forth here are derived from the allegations of the complaint. Citations to the appendices printed with the petition in No. 91-1643, which McCalden has xeroxed and attached to his own petition as well, will be styled "A__."

reasonable probability of property damage and of violence against plaintiff and members of defendant CLA." Complaint ¶ 32 (A67).

McCalden sought general and punitive damages against respondents Rabbi Hier, the Wiesenthal Center and the AJC for violation of California's Unruh Civil Rights Act, Cal.Civ.Code § 51.7. (A74). He also sued the City of Los Angeles, as well as the Center, Rabbi Hier and the AJC, for tortious interference with contractual relations and deprivation of unspecified federal rights in violation of 42 U.S.C. § 1983. (A64, A70).[2] Although the District Court dismissed McCalden's complaint under Fed.R.Civ.P. 12(b)(6), a divided panel of the Court of Appeals for the Ninth Circuit reversed in part and reinstated the Unruh Act, tortious interference and §1983 claims and remanded for a trial. (A15). No fewer than five members of the Ninth Circuit vigorously took issue with this part of the panel majority's decision and filed dissents from the denial of rehearing en banc, arguing that forcing respondents to proceed to trial on these claims violated the First Amendment. (A39-58). Those First Amendment issues are the subject of the petition for writ of certiorari in No. 91-1643, filed by the AJC, the Wiesenthal Center, Rabbi Hier and the City of Los Angeles on April 10, 1992.

McCalden also sought damages from respondents under 42 U.S.C. §1985(3), alleging that a "conspiracy" involving respondents was "directed against [him] not as an individual but solely because of his membership in a class known as Holocaust revisionists." (A72). Respondents Center, Hier and AJC allegedly petitioned the City Council of Los Angeles and other state and local public officials to put pressure on the CLA to cancel McCalden's exhibit, and allegedly persuaded the City Council to pass a resolution condemning the CLA for providing a forum for McCalden's anti-Semitic views. (A65-69). The District Court dismissed this claim (A27):

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[2] The Ninth Circuit also reinstated (and remanded for trial) McCalden's breach of contract claim against the CLA (A5-6), which is not at issue here or in any other petition for writ of certiorari.

> [P]laintiff alleges animus based upon unpopular and repugnant views concerning the mass extermination of the Jewish people by the Nazis during World War II. The court finds that plaintiff's allegations . . . fail to adequately allege that he is a member of a suspect or quasi-suspect class which is subject to protection under §1985(3).

The Court of Appeals for the Ninth Circuit affirmed, rejecting as wholly inadequate McCalden's allegations of "animus against the class of individuals holding particular unpopular historical views." (A12). The court below therefore held, relying on this Court's decisions in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), and *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983), that McCalden's "self-identified 'class'" does not "fall[ ] within the ambit of classes §1985(3) has been interpreted to protect." (A11-12).[3] McCalden moved for rehearing and rehearing en banc on the §1985 issue, but although the Ninth Circuit was sharply divided on the First Amendment issues raised by the defendants (now before this Court in the petition in No. 91-1643), not a single circuit judge disagreed with the panel's dismissal of McCalden's claims under §1985(3).

REASONS FOR DENYING THE WRIT

1. McCalden urges the Court to grant his petition to decide whether all "politically motivated conspiracies" are actionable under §1985(3) because the lower courts are supposedly in turmoil over this issue and because, he contends, said turmoil is this Court's own fault: "this Court has not resolved the issue . . . and, if anything, has added to the uncertainty on this point." Petition at 10. Strangely enough, in canvassing the supposed diversity of lower court opinion on this subject the petition does not so much as mention the

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[3] McCalden also sought relief pursuant to 42 U.S.C. §1986. The District Court's dismissal of this claim was likewise affirmed by the Ninth Circuit because, as McCalden himself concedes, Petition at 17, and as the court below held (A12), a claim can be stated under §1986 only if the complaint states a valid claim under §1985(3).

decision in *Nat'l Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), which is currently on review in this Court *sub nom. Bray v. Alexandria Women's Health Clinic*, No. 90-985 (argued October 16, 1991).

Surely any need for clarification of genuine doubts about the scope of §1985(3) will be met by the forthcoming decision in *Bray*. Despite McCalden's bold entreaty, however, there is in fact no turmoil surrounding the radical reading of §1985(3) that he proposes and, even if there were, this case would be a very poor vehicle for deciding such an issue.

2. Regardless of how *Bray* is decided, the §1985 holding in this case is unremarkable and unworthy of plenary review. The question here is not *which* classes, groups or associations are protected by §1985(3), but whether one even has to be a member of a group victimized by *class-based animus* in order to have a cause of action under that statute. Whatever else may be said of the scope of §1985(3), this Court has unanimously held that a prerequisite to bringing suit under that provision is the presence of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102. *See also Carpenters*, 463 U.S. at 835 ("class-based, invidious discrimination . . . was the central concern of Congress in enacting §1985(3)"); *id.* at 851 (Blackmun, J., dissenting)("Congress intended to provide a federal remedy for all *classes* . . . whenever a conspiracy involved invidious animus toward a class of persons")(emphasis in original).

Plaintiff McCalden is not a member of any "class" protected by §1985(3), nor a victim of any class-based animus. According to his own petition, McCalden's planned exhibit at the CLA conference was opposed by the respondents because they allegedly deem his "views" and "denial of the Holocaust" to be "a matter of grave concern to a much broader community than just the Jewish community" — "a battle against the forces of hatred or anti-Semitism." Petition at 7. Indeed, McCalden's complaint alleges that respondents' "only rationale" for acting against him was that his "views are generally thought to be repugnant, hateful and untruthful." Complaint, ¶ 43 (A69). In short, McCalden met opposition because of

his *own views*, not because of his race, religion, gender or membership in any political group.

The limitations written into §1985 cannot be sidestepped by McCalden's claim of membership in what he describes as an alleged "class known as Holocaust revisionists." Petition at 7. This is nothing more than creative labeling: McCalden meets widespread opposition when he plans an exhibit to proselytize his anti-Semitic, pro-Nazi views, so he claims to be a victim of a conspiracy aimed at "a class of Holocaust revisionists"; a school superintendent whose contract was canceled after he spoke out against the school board claimed he was the target of a conspiracy against the "class of school administrators concerned with proper administration of education." *Garcia v. Bd. of Education*, 498 F.Supp. 880, 881 (D.N.M. 1980) (rejecting §1985(3) claim). McCalden's §1985(3) claim, like that of the school official in *Garcia*, is a transparent attempt to "create[ ] a class around himself, tailored to the particular discrimination he claims to have suffered." *Id.*

If "classes" could be conjured as easily as McCalden thinks, so that every individual could be classified into myriad sets or categories on the basis of various traits, beliefs and characteristics, then the scope of §1985(3) would know no limits. But judicial application of that provision is an exercise not in clever set theory or linguistic taxonomy, but in statutory interpretation. In *Carpenters*, this Court deemed "difficult" the question whether

> §1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means. . . . If [plaintiff's] submission were accepted, the proscription of §1985(3) would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings.

463 U.S. at 836.

McCalden's reading of §1985 raises an even more troubling question. For "[e]ven if the section must be construed to reach

conspiracies aimed at any *class or organization* on account of its political views or activities," *id.* at 837 (emphasis added), there is no support in the legislative history or in logic for extending §1985(3) to reach concerted opposition to a particular planned public exhibit based on the "historical" (A12) and "scientific" views, Petition at 7, that the speakers espoused and planned to present. Under McCalden's reading, every speaker who claimed he'd been shouted down by his opponents, and every individual who claimed his rights had been infringed by concerted action, would become a class unto himself, and opposition to him would become class-based animus.

Petitioner's construction would make §1985(3) as all-encompassing as the version of the law originally introduced in the House of Representatives in 1871, which "provoked strong opposition in that chamber and precipitated the proposal and adoption of a narrowing amendment," *Carpenters*, 463 U.S. at 834, which required "class-based, invidious discrimination," *id.* at 835. *See also Griffin*, 403 U.S. at 101-02. Section 1985(3) would thus be transformed into precisely what those who wrote and adopted it expressly refused to enact: "a federal remedy for 'all tortious, conspiratorial interferences with the rights of others.'" *Carpenters*, 463 U.S. at 834 (quoting *Griffin*, 403 U.S. at 101.).

3. There is no authority for McCalden's reading of the class animus requirement as infinitely elastic. The cases on which petitioner relies involved pre-existing groups, well defined either by an immutable characteristic such as race, ethnicity or gender, or by membership in a political organization such as the Republican Party. *See* Petition at 11-13. Indeed, some of McCalden's authorities actually undermine his argument. For example, *Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989), held that the rule that political *parties* are protected by §1985(3) was of no help to the plaintiff "because Gleason does not claim discrimination based on his political party affiliation":

> He alleged only that he was discriminated against because he was a political opponent of the defendants and was extremely vocal in his opposition to their management of the Village.

> As the Fourth Circuit has held, "those who are in political and philosophical opposition to [the defendants], and who are, in addition, outspoken in their criticism of the [defendants'] political and governmental attitudes and activities" do not constitute a cognizable class under §1985.

Id. at 685 (quoting *Rodgers v. Tolson*, 582 F.2d 315, 317 (4th Cir. 1978)).

Similarly, *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), held that before suit may be brought under §1985(3) for an alleged conspiracy based on political animus, "there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act." *Id.* at 839-40 (finding class-based animus against members of American Indian Movement).

McCalden also contends that *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986), effectively recognized the sufficiency of "essentially political" animus, because the court's finding of "racial animus" could not have been correct "since 'Mexicanos' are not a race but an ethnic group." Petition at 13. McCalden's restrictive notion of "race" partakes more of 19th-century anthropology (or eugenics) than of 20th-century law — ethnic minorities such as Hispanics have long been deemed protected by civil rights laws and the Equal Protection Clause. In any event, *Martinez* provides no support for petitioner's proposed expansion of §1985(3) to include "classes" defined by the circumstances of a particular ideological dispute:

> Martinez is a member of a racial and national minority and clearly alleges that he has been conspired against because of his race, political and social beliefs, and activities on behalf of his own and other minorities. . . . [H]e is not alleging a purely politically motivated conspiracy . . . .

771 F.2d at 440.

4. McCalden's only rationale for expanding §1985 so radically is that it would supposedly be unconstitutionally discriminatory to have

a law that protected classes defined by race but not "classes" defined by what he calls "historical" or "scientific" views. Petition at 13-14 & n.11. If this principle were adopted, it would doom a host of civil rights laws that outlaw discrimination by private parties based on race, creed, color, gender or national origin but not discrimination based on ideas or points of view.

5. Finally, the activities for which McCalden seeks damages under §1985(3) are all *prima facie* protected by the First Amendment: the Center, Rabbi Hier and the AJC allegedly petitioned the Los Angeles City Council and communicated to the CLA their plans for a public counter-demonstration if McCalden's exhibit were not canceled, and the City Council adopted a resolution calling for a boycott of the CLA. As argued in the petition for writ of certiorari in No. 91-1643, and as argued by five judges of the Ninth Circuit below, dissenting from the denial of rehearing en banc, the decision of the two-member panel majority to allow McCalden to proceed with his civil rights suit against defendants' protected expression is a perversion of the civil rights laws and a threat to the First Amendment. Those issues, which are addressed only in No. 91-1643 and not in McCalden's petition here, are worthy of this Court's plenary attention. But McCalden's plea for a radical expansion of §1985(3) is not.

CONCLUSION

For the reasons set forth above, this petition should be denied.

Respectfully submitted,

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